SUPREME COURT OF THE UNITED STATES.

No. 163.

EZRA S. STANLEY, FREDERICK L. STANLEY, HENRY F. STANLEY, AND EDWARD A. STANLEY, PLAINTIFFS IN ERROR,

vs.

ELIZABETH J. COLT.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CONNECTICUT.

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with Sentinel Lt. Neil.

1 UNITED STATES OF AMERICA, *ss:*

To Mrs. Elizabeth J. Colt, of the town and county of Hartford, in the State and district of Connecticut, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December, A. D. 1864, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the second circuit and district of Connecticut, wherein Ezra S. Stanley, Frederick L. Stanley, Henry F. Stanley, and Edward A. Stanley are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgement in the said writ
2 of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States, this 8th day of September, 1864.

WM. D. SHIPMAN, *Judge.*

I hereby acknowledge due and legal service of the foregoing writ.
Hartford, Sept. 21st, 1864.

E. H. COLT.

3 The President of the United States of America to the judges of the circuit court of the United States for the second circuit and district of Connecticut, greeting.

Because in the record and proceedings, as also in the rendition of a judgement in a plea which is in the said court before you between Ezra S. Stanley, Frederick L. Stanley, Henry F. Stanley, and Edward A. Stanley, plaintiffs, and Elizabeth J. Colt, defendant, a manifest error has happened, to the great damage of the said plaintiffs, as by his complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are
4 hereby commanded, if judgement be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December, A. D. 1864, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Bond to prosecute is given.

Witness the Hon. Roger B. Taney, chief justice of the Supreme Court of the United States, at Hartford, this 20th day of September, A. D. 1864.

ALFRED BLACKMAN, *Clerk.*

5 UNITED STATES OF AMERICA,
District of Connecticut, New Haven,
U. S. Circuit Court Clerk's Office, ss:

In the matter of Ezra S. Stanley *et al. vs.* Elizabeth J. Colt.

I, Alfred Blackman, clerk of the circuit court of the United States for the 2d circuit and the district of Connecticut, do certify that the annexed is a true copy of the record of the judgment in said cause.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this 4th day of August, A. D. 1864.

Attest: ALFRED BLACKMAN, *Clerk.*

6 DISTRICT OF CONNECTICUT, *ss:*

At a circuit court of the United States of America, holden at New Haven, within and for the district of Connecticut, on the fourth Tuesday of April, A. D. 1863.

Present: Honorable Samuel Nelson, one of the justices of the Supreme Court of the United States.

EZRA S STANLEY *et al.*
vs.
ELIZABETH J. COLT.

Be it remembered, that Elizabeth Jarvis Colt, of the town and county of Hartford, in the State and district of Connecticut, was summoned to appear before the honorable circuit court of the United States of America for the second circuit, next to be holden at Hartford, in and for said State and district, on the fourth Tuesday of April, A. D. 1862, then and there to answer to Ezra S. Stanley and Frederick L. Stanley, both of the town of Waltham; Henry F. Stanley, of the town of Enfield, and Edward A. Stanley, of Amherst, all in the State and district of Massachusetts, and residents in and citizens of the State and district of Massachusetts, in a plea that to the plaintiffs the
7 defendant render the seizin and peaceable possession of a certain tract of land lying in said Hartford, and now or formerly bounded and described as follows, to wit: "A certain piece of land, with the buildings thereon, situated on the Weathersfield road, and bounded west on said road; south on land of Harriet Barnard; east on land of Solomon Porter, and on land of Chancey W. Camp, and north on land of said Camp, containing about eighteen acres, more or less; of which tract of land the plaintiffs heretofore, to wit, on the 3d day of August, A. D. 1832, were well seized and possessed in their own right in fee simple, and so continued thereof possessed until afterwards, to wit, on the 1st day of March, 1862, when the defendant, without law or right, and contrary to the mind and will of the plaintiffs, thereinto entered and ejected the plaintiffs therefrom, and ever since has deforced and still does continue to deforce and hold the plaintiffs out of the premises, taking the profits to herself. All which is to the damage of the
8 plaintiffs in the sum of two thousand dollars.

Second count.—And also, that in a plea that to the pl'ffs the def'dt render the seizin and peaceable possession of a certain other piece of land, situated on the Weathersfield road, in said Hartford, and now or lately bounded and described as follows, to wit: west on Weathersfield road; south on land of Harriet Barnard; east on land of Solomon Porter and on land of Chancey W. Camp; and north on land of said Camp, containing about eighteen acres, more or less; of which tract or parcel of land the pl'ffs, heretofore, to wit, on the first day of August, 1832, were well seized and possessed in their own right in fee simple, to wit, of shares of the same in common with , and so continued thereof possessed until afterwards, to wit, the 1st day of March, 1862, when the defendant, without law or right, and contrary to the mind and will of the plaintiffs, therein entered and ejected the plaintiffs therefrom, and ever since has deforced and still does continue
9 to deforce and hold the plaintiff out of the premises, taking the profits to herself. All of which is to the damage of the pl'tffs the sum of two thousand dollars, to recover which the plaintiffs bring this suit, and demand possession of said premises, with said damages and costs of suit.

And the said plaintiffs, by Thomas C. Perkins, esq, their attorney, appear, and the said defendant, by Messrs. Hubbard & MacFarland, her attornies, also appears. And at the present term of this court, holden as aforesaid, to which time the defendant had leave to implead to the declaration aforesaid, come as well the said defendant, by her said attornies, as the said plaintiffs,

by their said attornies. And now the defendant in court to the said declaration pleads as follows:

The defendant defends, pleads, and says that she has done the plaintiffs no wrong and disseisin in manner and form, as the plaintiffs in their declaration have alleged, and thereof puts herself on the country.

10 To which plea of the said defendant as above pleaded the plaintiff's, by their said attorney, replies as follows:

And the plaintiff do the like.

Therefore the marshal of the said district is commanded that he cause to come here immediately, twelve, &c., by whom, &c., and who, &c., to recognize, &c., because as well, &c., and the jurors of the said jury by the marshal for this purpose empannelled and returned, to wit: Edwin Leavenworth, Marcus E. Baldwin, John M. Burrall, David B. Hurd, Bennet B. Peck, Lewis Whiting, Stephen S. Booth, William J. Pettee, Isaac Quintard, Daniel Cruttenden, Minot L. Beardsley, and Henry L. Post, being called, come, who, being elected, tried, and sworn to speak the truth of and concerning the premises, upon their oath, say, under the instructions of the court, that they find the issue for the plaintiffs, and therefore find for the plaintiffs to recover of the defendant the seizin and possession of the demanded premises, together with one dollar damages and their costs.

Which verdict is accepted subject to the opinion of the court, with
11 leave to the party aggreived to file his or their bill of exceptions to the rulings of the court within such time as the court shall limit for that purpose.

And thereupon afterwards, to wit, on the 4th day of December, 1863, it was ordered by the court that judgment be rendered for the defendant upon said verdict, to recover of the plaintiffs his lawful costs, taxed at $, and that the plaintiffs have leave to present the facts adduced in evidence upon the trial of said cause in their bill of exceptions to the ultimate ruling of said court.

And thereupon afterwards, to wit, on the 14th day of March, 1864, the plaintiff filed the following bill of exceptions in said cause, which is duly allowed by said court, to wit:

Bill of exceptions.

Be it remembered, that on the trial of this case to the jury, upon the plea of the general issue as on file, the following documents were offered and admitted in evidence and the following facts were proved:

That on the 7th day of October, A. D. 1786, William Stanley, then of Hartford, in the State of Connecticut, made and executed in due form of law to pass real estate his last will and testament, a copy of which is hereto annexed, marked A.

That the said Stanley, shortly after and prior to the 9th day of January, A. D. 1787, departed this life, and on the last-named day said will was
12 duly proved and approved in the court of probate having jurisdiction thereof.

That from the year 1702 or earlier, and down to the year 1818, there existed and was in force in the State of Connecticut a public act, a copy of which is hereto annexed, marked B, and said act with some unimportant alterations, has continued in force until the present time.

The land described in the plaintiffs writ belonging to the said Stanley at the date of his will and of his decease, and constituted a portion of the premises devised in the said will to the Second or South Eclesiastical Society, in the town of Hartford.

That for many years prior to the date of said will, and thence down to the present time, the said ecclesiastical society has been and is a corporation

established by authority of the State of Connecticut for the support of the gospil ministry and the maintenance of public worship, and with power for that purpose by the laws of the State of Connecticut during all the time aforesaid to hold real estate.

That upon the decease of the said Abigail Whitmore named in
13 said will, to whom by the terms thereof a life estate in the premises was given, and which decease was prior to the year 1800, the said ecclesiastical society took possession of the premises, claiming the same under said will, and down to the date of the deed hereinafter mentioned to Samuel Colt, the said society and the trustees, as provided for in said will, have managed the premises in the manner directed in said will, and the income thereof, has, from time to time, been appropriated to the purposes of said society.

During the whole time aforesaid the premises have been exempt from taxation, and no taxes have been paid thereon, the only ground for such exemption being the provision in the said act, copy of which is hereto annexed, marked B.

The plaintiffs are a portion of the heirs-at-law of the testator and were so prior to the year 1852.

In the year 1852, and without notice to the plaintiffs, or any of them, the legislature of the State of Connecticut, upon the application of said society and of the trustees appointed in pursuance of the provisions of said will, passed the resolution, copy of which is hereto annexed, marked C, the
14 premises described in said writ being a portion of the premises described in said resolution.

That afterwards, to wit, on the day of , A. D. 185 , by direction of said society and of said trustees, the premises described in said writ were put up for sale at public auction, accompanied with notice given when the premises were so exposed for sale by the auctioneer, that a mere quit-claim deed of the same would be given to the purchaser, and that no warranty of title or other covenants would be given to the purchaser.

After the same were so exposed to sale and before the same were sold, the pl'ffs at the place of sale publicly gave notice that they, as the heirs of said Stanley, by whom the same had been devised to said society claimed, and should claim that said sale, if made, would be invalid; that the purchaser thereof would acquire no title thereto, and that his right thereto would be contested by them as the heirs-at-law of said testator. That said Colt then and there having knowledge of all the facts and claims aforesaid, became the purchaser of said property described in said writ and received the deed thereof, copy of which is hereto annexed, marked
15 D, executed by authority of said society and of said trustees.

That after the said sale and delivery of said deed to said Colt, and while he was in possession of the premises, claiming under said sale and deed, the pl'ffs, as heirs of said William Stanley, made due and legal entry into and upon the same for breach of the condition in the said devise contained; but said Colt refused to deliver up possession thereof to the pl'ff.

The said Colt departed this life prior to the commencement of this suit. That the defendant, his widow, thereupon entered into possession of the premises, and has ever since continued to occupy the same, claiming under the title so acquired, as aforesaid, by said Colt, and was in possession at the time of the commencement of this suit, prior to which time the pl'ffs demanded of her possession of the premises, with which demand she refused to comply.

The court, after the evidence was closed, instructed the jury, there being no dispute as to the facts, that the defendant was entitled to their verdict upon the law of the case, and a verdict was rendered accordingly;

16 to which instruction the counsel for the plaintiffs then and there excepted.

And inasmuch as the said several matters so produced and given in evidence on the part of the said plaintiffs, and by the plaintiffs' counsel aforesaid insisted on as entitling the said plaintiff to a verdict on the said issue, do not appear by the record of the verdict aforesaid, the said counsel for the pl'ffs did then and there propose his aforesaid exceptions to the opinion of the said court, and requested the said court to put its seal to this bill of exceptions containing the said several matters so produced and given in evidence on the part of the plaintiffs as aforesaid, according to the form of the statute in such case made and provided.

We hereby consent that the foregoing bill of exceptions may be filed as of the day when it should have been filed by the rules of court, but we do not hereby waive any right to object to the same for either matter of form or substance.

Hartford, March 11th, 1864.

HUBBARD & McFARLAND,
Counsel for Defendant.

[SEAL.] S. NELSON.

18 A.— *William Stanley's will.*

In the name of God, amen. I, William Stanley, of Hartford, in the county of Hartford and State of Connecticut, being weak in body but of sound mind and memory, blessed be God, considering the uncertainty of human life, do now in the fear of God, in whose mercy alone through Jesus Christ I hope for salvation and happiness after this life, make and ordain this to be my last will and testament. After the payment of my just debts and funeral expenses I give and bequeath my wordly estate in the manner and form following, to wit:

Imprimis. I give and bequeath unto the Second Church of Christ, in Hartford, such sum, to be paid out of the profits or rents of my real estate as hereafter mentioned, as shall be necessary to purchase a silver tankard of the same weight and dimensions, as near as conveniently may be, of that one formerly given said church by Mr. John Ellery, deceased; the same to be procured by my trustees, hereafter named, and presented to the officers of said church, to be kept forever for the use and benefit of said church, and my said trustees are to cause my name, coat of arms, the time of my death and my age, thereon to be engraved.

Item. I give and devise unto my neice, Elizabeth Whitman, one piece of land, lying in said Hartford, containing about twelve acres, be the same more or less, and lyeth at the west end of my Rocky Hill lot, and is on the west side of the river commonly known by the name of Hogg River, and buts east on said river, and south on Medad Webster's land; also one other piece of land lying in said Hartford, in the parish of West Hartford, and is part of the farm that formerly belonged unto my honored father, Col. Na-
19 thaniel Stanley, deceased, and lies in the southeast corner of said farm, and buts on a highway, and contains about five acres, be the same more or less; both of said pieces of land I give unto the said Elizabeth, and to her heirs and assigns forever, provided she shall not make any claim upon my estate for any services done for me.

Item. I give and bequeath unto my beloved sister, Abigail Whitman, all the remainder of my personal estate, after the payment of my debts and funeral expenses therefrom, to be her own forever; and I do also give and devise unto my said sister Abigail the use and improvement of all my real estate (except that part thereof given unto her daughter Elizabeth) during

her natural life, with this reserve, that she shall not cut any of the trees growing in that lot called Rocky Hill lot.

Item. After the decease of my said sister, Abigail Whitman, I give and devise the whole of my real estate, of every kind and description, except which is hereinbefore given unto my niece, Elizabeth Whitman, unto the Second or South Ecclesiastical Society, in the town of Hartford, to be and remain to the use and benefit of said Second or South Society and their successors forever; provided that said real estate be not ever hereafter sold or disposed of, but the same be leased or let, and the annual rents or profits thereof applied, to the use and benefit of said society, and the letting, leasing, and managing of said estate to be under the management and direction of certain trustees hereafter named by me, and their successors to be appointed in manner as hereafter directed. And it is my will that the first rents, profits, or avails issuing from said real estate shall, by my trustees after it comes to their possession, be applied to the purchasing of the aforesaid tankard, given in this my will to the Second Church of said Second Society, unless the same shall be procured and paid for before my decease. And it is my will that so much of the rents, profits, or avails next issuing out of my real estate, my said trustees shall reserve in their own hands as shall
20 be sufficient to purchase and pay for the one-half part of the price of a proper bell for the meeting-house in said Second Society, of the same weight and dimensions of that in the North Meeting-House, in said town of Hartford, and be applied by my said trustees for that purpose; provided that the other part be procured by subscription or otherwise without taxing the inhabitants of said society; and in case said Second Society shall ever hereafter be divided, it is my will that my said real estate be not divided, but remain entire and forever to the said Second Society, and such part of said society as shall hereafter secede or be devided therefrom are hereby excluded from all the use and benefit of my said estate so devised as aforesaid to said Second Society.

And for the best management and direction of my said real estate I do hereby appoint my friends, William Ellery, Jonathan Bull, and Daniel Hinsdale, all of Hartford, trustees to superintend, direct, and manage said real estate for the use and benefit of said Second Society in manner as above directed, and unto them, my trustees, I do give authority and power to nominate their successors to said trust, which is to be done in the manner and form following, viz: That immediately after my decease they, or the survivor or survivors of them, shall nominate and appoint some meet person or persons, as occasion may require, into said trust and office; so be it that at no time more than three persons shall act in said trust or office or belong thereto at the same time, and when at any time any person or persons shall be nominated and appointed to said trust or office, the trustees shall make a certificate of such appointment, and the same lodge with the clerk of said Second Society. And all persons successors hereafter to said trust and office shall at all times in future have like power to superintend, direct, and manage said estate for said society, and in like manner to nominate
21 and appoint their successors in said trust and office, and to perpetuate said trust for the benefit and use of said society as occasion may from time to time require. And the aforesaid real estate or any part thereof shall not be rented or let for a longer term or lease than thirty years before the expiration of the same, and said trustees and their successors shall have full power to let and lease said estate, and to do all other legal acts for the well ordering and management of said estate under the limitation and restrictions as herein is before expressed. And I do hereby appoint Mr. William Ellery and William Adams, esqrs., of said Hartford to be executors of this my last will and testament, hereby revoking all former wills and testaments by me made.

In testimony whereof, I have hereunto set my hand and seal this seventh day of October, in the year of our Lord one thousand seven hundred and eighty-six.

Signed, sealed, published, and declared to be his last will and testament by said William Stanley.

(Signed) WILLIAM STANLEY. [SEAL.]

In the presence of us—

JESSE ROOT.
JERE WADSWORTH.
CHAUNCEY GOODRICH.

Proved and approved January 9, 1787.

22 B—*Copy of the provision relating to lands given for public and charitable uses, as it appears in the statutes of Connecticut, edition of* 1786.

Be it enacted and ordained by the authority aforesaid, That all such lands, tenements, hereditaments, and other estates that either formerly have been, or hereafter shall be, given and granted, either by the general assembly of this colony or by any town, village, or particular person or persons, for the maintenance of the ministry of the gospel in any part of this colony, or schools of learning, or for the relief of poor people, or for any other public and charitable use, shall forever remain and be continued to the use or uses to which such lands, tenements, hereditaments, or other estates have been, or shall be, given and granted, according to the true intent and meaning of the grantors, and to no other use whatsoever; and also be exempted out of the general lists of estates, and free from payment of rates.

23 C.

Upon the memorial of the Second Ecclesiastical Society, in the town of Hartford, in Hartford County, and Charles Wells, William S. Wadsworth, and John Barnard, all of said Hartford, trustees under the last will and testament of William Stanley, late of said Hartford, deceased, and showing to this assembly that said William Stanley by his said late will, bearing date on the seventeenth day of October, A. D. one thousand seven hundred and eighty-six, which was proved and approved by the court of probate for the district of Hartford, on the ninth day of January, A. D. seventeen hundred and eighty-seven, devised to said society certain real estate, lying in said Hartford, as follows, viz: "After the decease of my sister, Abigail Whitman, I give and devise the whole of my real estate, of every kind and description, except what is before given unto my neice, Elizabeth Whitman, unto the Second or South Ecclesiastical Society, in the town of Hartford, to be and remain to the use and benefit of said Second or South Society, and their successors forever." And said will provided that said lands should be leased out for an annual rent for a term not exceeding thirty years before the expiration of
24 said lease, and that said estate should never be sold or disposed of, but that the same should be leased or let perpetually, and that the annual rent or profit thereof should be applied to the use and benefits of said society; and said will further provided that the letting, leasing, and management of said estate should be under the direction of the trustees named in said will and their successors, who should have the sole power to superintend, direct, and manage said estate for said society; and the manner in which said trust should be perpetuated is prescribed in said will; and that the memorialists named as trustees are the successors of said trustees orignally appointed, and are duly constituted as such, according to the provisions of said will. Also showing that said Abigail Whitman, the tenant

for life, has deceased, and that said estate has vested in the said society in fee simple absolute, and consists of the following described tracts or parcels, viz: one tract of about eighteen acres, lying on the road to Wethersfield, bounded west on Solomon Porter and on land of Chauncey W. Camp, 25 and north on land of said Camp; one tract lying at Rocky Hill, containing about fifty acres, bounded east on highway, south on highway and land of Joseph Webster's heirs, west on Hog River, and north on land of the heirs of Richard Seymour; one tract in the North Meadow, containing about eight acres, bounded west on Meadow road, south on land of Edward Kenyon, east on Connecticut River, and north, now or late, on land of Richard Goodman's heirs; one tract, lying up neck, containing about seven acres, bounded west on Windsor road, south on land of Elijah Mather, east on meadow creek, and north on land of ———; the other tract lies on Main street, and is bounded east on Main street, south on Mill street, west on land of the heirs of John Burkitt, deceased, or of their assigns, and north on land of James Ward. Also showing that said property is under outstanding leases, which expire about the tenth day of March, eighteen hundred and fifty-six, excepting said tract of about eight acres, the lease of which will expire in eighteen hundred and sixty-five; that it has on it a great number of buildings, dwelling-houses, and stores and other tenements, owned by the 26 tenents, built of wood, and in a decayed state; that the land on which they stand has, by a lapse of about three-fourths of a century, become valuable; some of which is in the central part of the city of Hartford, and too valuable to be improved profitably in any other way than by the erection on them of permanent brick or stone blocks of buildings; that the lessees cannot safely erect such buildings, because of the uncertainty of their tenure, and because they would thereby place themselves in the power of the owners, and that the owners have not the means, and could not lawfully contract debts for the purpose of buildings; that other parts of the estate are subject to other embarrassments arising from the restrictions of the will, so that said property has become unproductive, and the income greatly reduced, and the object of the testator, in devising the property to the society frustrated, as is more at large set forth in the memorial; that those embarrassments both to the owners and occupants, consequent on the restrictions in the will, are not likely to be removed, but will be increased by time unless said 27 land can be sold and conveyed in fee simple, and the proceeds suitably invested. Praying the assembly to authorize a sale and conveyance of said land, under such guards and provisions as will secure the application of the proceeds, according to the true intent and meaning of said will, as per petition on file, dated May 4th, A. D. 1852, this memorial was brought to the general assembly, at their present session. This assembly having enquired into the facts stated in said memorial, find the same to be true, and do further find that the most valuable portion of said estate is situated in a central part of said city of Hartford, is covered with unsuitable wooden buildings, and it is for the interest of the people of said city that more useful and valuable buildings should be built thereon, and do grant the prayer thereof, and it is therefore—

Resolved by this assembly, That the said trustees and their successors, together with David F. Robinson, as agent, shall have power, and they are hereby authorized, to sell and convey the said lands in said memorial mentioned, and such parts or proportions thereof as may from time to 28 time be advantageously sold, and to execute good and sufficient deeds thereof in fee simple, with or without covenants of seizin and warranty on the part of said society, subject to liens or incumbrances, if any shall lie upon said property; and it is provided that in case of sale, each owner of any building standing on said lands shall have liberty to remove the same off

from said lands during the continuance of the present term or lease under which he now occupies. And the proceeds or avails of such sales shall be, by the trustees and agent, invested in good and sufficient bonds and mortgages of real estate, of double the value of the amount invested, with interest payable annually or oftener; and the interest and income of said proceeds or avails shall be paid over to the treasurer of said society, and shall be appropriated to the use of said society in the same manner and subject to the same use as the rents or income of said property are, by said will, required to be appropriated, and for no other uses or purposes whatever.

And it is further provided that in case the said David F. Robinson
29 shall refuse to act as agent, or shall decease, or become in any way incapacitated to act, said society may by ballot elect some other person to act as agent in his stead, and so from time to time said society may thus elect some other person to act as agent with said trustees in making said sales. And in case of a vacancy in said board of trustees, any two trustees may act, and in such case any deed of said land, signed by said agent and two of said trustees, shall be good and valid. And it is provided that all mortgages or investments made as aforesaid, from time to time, and whenever such loans or investments shall be shifted or changed, the securities shall be taken in the name of such trustees and their successors, and expressed to be for the use and benefit of said society, according to the will of William Stanley, deceased: *Provided, however*, That before any person or persons shall proceed to make sale of said lands, or any part thereof, he or they shall become bound, in a good and sufficient bond, to the judge of probate for the district of Hartford, conditioned for the faithful performance of his duty in the premises, and said trustees shall also give the
30 like bonds for the faithful performance of their trust.

This act shall be duly recorded in the records of said town of Hartford, before the same shall take effect.

31 D.

To all people to whom these presents shall come, greeting:

Whereas William Stanley, late of Hartford, deceased, by his last will, bearing date on the 17th day of October, A. D. 1786, devised to the South Ecclesiastical Society a certain tract of land lying in said Hartford, bounded west on the Wethersfield road, south on land of Solomon Porter and on land of Chauncey W. Camp, and north on land of said Camp, containing about eighteen acres, be the same more or less, the same to be leased for the use and benefit of said society, in the manner prescribed by said will, forever, and said will provided for the appointment of trustees to carry into effect the provisions of said will. And whereas the persons now acting as such trustees are Charles Wells, William S. Wadsworth, and John Barnard, all of said Hartford and said society, and said trustees, upon petition to the general assembly at their May session, A. D. 1862, for leave to sell said land, obtained an act of said assembly, in which said assembly resolved that the said trustees, together with David S. Robinson as agent should
32 have power to sell and convey said lands, and execute a good and sufficient deed thereof in fee simple, subject to any incumbrance that may be upon the same; and, among other things, it is provided by said resolution that in case of sale, each owner of any building standing on said lands shall have liberty to remove the same therefrom during the continuance of the present term or lease under which he now occupies, and that said agent and trustees, previously to any sale thereof, should give good and sufficient bonds to the judge of probate for the district of Hartford, for the faithful

performance of their duty and trust, as by the records of the court of probate for the district of Hartford establishing said will, and by the records of the general assembly, to which reference is made for the contents of s'd will and of s'd act of assembly, will more at large appear. And whereas the said lands are now under lease from the trustees of said will originally made to Ransom Whitmore, and to some other person, bearing date March 10th, A. D. 1830, for the term of twenty-six years, and until March 10th, 1865. (Reference is made to the records of lands of the said town of Hart-
33 ford for the tenor of s'd leases respectively.) And whereas s'd agent and trustees having given good and sufficient bonds to s'd judge of probate, as required by s'd act, and having sold to Samuel Colt, of said Hartford, esquire, all the right, title, and interest of said society in said premises, subject to the rights of the lessees and their assigns, or the owner of any building standing on said lands, to remove the same as prescribed by s'd act of assembly: Wherefore know ye that, in pursuance of s'd act of assembly and by virtue of the powers thereby conferred upon us, we, Charles Wells, William S. Wadsworth, and John Barnard, trustees, and David F. Robinson, agent, all of s'd Hartford, for the consideration of six thousand dollars to us in hand paid, the receipt whereof is hereby acknowledged, have bargained and sold, and in our said capacity, in virtue of said act of assembly, we do hereby bargain and sell, alien and convey unto the said Samuel Colt all the right, title, and interest that s'd Second Ecclesiastical Society in Hartford have or ought to have in or to the above described tract of land, and to the rents issuing out of the same, subject to the rights of the lessees or
34 their assigns, and of the owner of any building standing on said lands, as provided by s'd act of assembly. To have and to hold the premises unto him, the s'd Samuel Colt, his heirs and assigns, to the only use and behoof of the s'd Samuel Colt, and of his heirs and assigns, forever, so that neither the s'd South or Second Ecclesiastical Society in Hartford, nor s'd trustees, nor any person in their name and behalf, shall or will hereafter claim or demand any part thereof, but they and every of them shall by these presents be precluded and forever barred.

In witness whereof, we have hereunto set our hands and seals, 30th day of August, A. D. 1852.

CHAS. WELLS, [L. S.]
W. S. WADSWORTH, [L. S.]
JOHN BANARD, [L. S.]
Trustees.
DAVID F. ROBINSON, [L. S.]
Agent Second Eccs. Society.

Signed, sealed, and delivered in presence of—
HORACE GOODWIN.
HENRY FRANCIS.

HARTFORD COUNTY, *August 30th*, 1852.

Personally appeared Charles Wells, William S. Wadsworth, John Barnard, and David F. Robinson, signers and sealers of the foregoing instrument, and acknowledged the same to be their free act and deed, before me.

HENRY FRANCES, *Justice of the Peace.*

35 UNITED STATES OF AMERICA,
District of Connecticut, New Haven, Circuit Court Clerk's Office, ss:

In the matter of Ezra S. Stanley and others *vs.* Elizabeth J. Colt.

I, Alfred Blackman, clerk of the circuit court of the United States for the second circuit and the district of Connecticut, do certify that the annexed is

a true copy of the record of the addition to the bill of exceptions as heretofore allowed in said cause, which addition is made by order of his honor Judge Nelson, with directions to return the same to the Supreme Court of the United States, at Washington.

In witness whereof, I have hereunto set my hand and affixed the seal of said court this 1st day of November, A. D. 1864.

Attest: ALFRED BLACKMAN, *Clerk*.

36 In the circuit court of the United States for the district of Connecticut.

EZRA S. STANLEY AND OTHERS
vs.
ELIZABETH J. COLT.

It having been agreed to by the respective counsel in the cause aforesaid, and allowed by his honor Judge Nelson, that the following copy of the petition to the legislature of Connecticut be added to the bill of exceptions heretofore granted in the above-entitled cause, the same is accordingly filed in the clerk's office of the United States circuit court for the district of Connecticut, and added to the record, this 31st day of October, 1864, the resolves of the legislature of Connecticut referred to and recited in the bill of exceptions aforesaid, having been passed on granting the prayer of said petition by the legislature aforesaid.

37 To the honorable general assembly of the State of Connecticut, to be held at New Haven, in said State, on the first Wednesday of May, A. D. 1852:

The memorial of the Second Ecclesiastical Society, in the town of Hartford, in Hartford County, and of Charles Wells, William S. Wadsworth, and John Barnard, all of said Hartford, trustees duly constituted and appointed under and by virtue of the last will and testament of William Stanley, late of Hartford, deceased, of the real estate hereafter described, for the use and benefit of said society, humbly sheweth that heretofore, viz: on the seventeenth day of October, A. D. one thousand seven hundred and eighty-six, William Stanley, of said Hartford, made and published in due form of law, his last will and testament, which was afterwards consummated by his death, and was duly proved and approved by the honorable court of probate for the district of Hartford on the ninth day of January, A. D. one thousand seven hundred and ninety-seven, and in and by said will the said testator did devise certain lands and tenements lying in said Hartford, of which he
38 was seized in his own right in fee simple, in manner following, viz:

"After the decease of my sister, Abigail Whitman, I give and devise the whole of my real estate of every kind and description, except what is hereinbefore given unto my niece, Elizabeth Whitman, unto the Second or South Ecclesiastical Society, in the town of Hartford, to be and remain to the use and benefit of said Second or South Society and their successors forever; provided that said real estate be not ever hereafter sold or disposed of, but the same be leased or let, and the annual rents or profits thereof applied to the use and benefit of said society, and the letting and leasing and managing said estate to be under the management and direction of certain trustees hereafter appointed in manner as hereafter directed."

And the petitioners further represent that said testator named and appointed in said will three persons to be such trustees and prescribed the mode for the appointment of their successors and for the perpetuation of said trust, as follows, viz:

"And all persons successors thereafter to said trust and office, at
39 all times in the future, have the power to superintend, direct, and

manage said estate for said society." And said testator further declared it to be his will that "said real estate, or any part thereof, shall not be rented or let for a longer term or lease than thirty years before the expiration of the same, and said trustees and their successors shall have full power to let and lease said estate, and to do all other legal acts for the well ordering and management of said estate under the limitations and restrictions as herein is before expressed."

And the memorialists would further state that said Abigail Whitman has deceased and that said estate has vested in said society absolutely in fee simple, and that the memorialists herein and above named as trustees of said estate are the successors of the persons named in said will as trustees, and have been duly constituted such according to the provisions of said will.

And furthermore, that said estate, so devised as aforesaid, consists of the following described parcels and tracts, with the buildings and tenements thereon standing, viz:

40 One tract of about eighteen acres, lying on the road to Wethersfield, bounded, west, on said road; south, on land of Harriet Barnard; east, on land of Solomon Porter and on land of Chauncey W. Camp, and south, on land of said Camp.

One tract lying at Rocky Hill, containing about fifty acres, bounded, east, on highway; south, on highway and land of Joseph Webster's heirs; west, on Hog River, and north, on land of the heirs of Richard Seymour.

One tract in the North Meadow, containing about eight acres, bounded, west, on Meadow road; south, on land of Edward Kenyon; east, on Connecticut River, and north, (now or late,) on lands of Richard Goodman's heirs.

One tract lying up neck, containing about seven acres, bounded, west, on Windsor road; south, on land of Elijah Mather; east, on Meadow Creek, and north, on land of

The other tract lies on Main street, and is bounded, east, on Main street; south, on Mill street; west, on the land of the heirs of John Buskett, deceased, or of their assigns, and north, on land of James Ward.

41 Said property is all under outstanding leases, which expire about the tenth day of March, eighteen hundred and fifty-six, excepting said tract of about eight acres, the lease of which will expire in eighteen hundred and sixty-five.

Your memorialists beg leave to represent to your honorable body that said property has on it a great number of buildings, dwelling-houses, and stores and other tenements, owned by the tenants, built of wood and in a decayed state, and the land on which they stand has, by a lapse of three fourths of a century, become valuable, some of which is in the heart of the city of Hartford and too valuable to be improved profitably in any other way than by means of permanent brick or stone blocks of building, which the tenants are unwilling to erect by reason of the uncertain tenure by which they hold or occupy, as no lease, by the terms of said will, can exceed thirty years in duration, and it would be hazardous for the lessees thus to build, as it would be impracticable to anticipate what would be the condition and value of such buildings at the end of the lease and to provide for the safety of the tenant.

42 The society would not be willing to purchase at the end of the term, and neither party would be willing, in a matter of so much importance, to put himself into the hands of appraisers, besides which it would not probably be in the power of the society to make the purchases for the want of means, if they had the power by law to do it. And the memorialists are advised that a covenant to renew a lease would be void, as it would in effect be a lease for a longer term than is authorized by the will.

The above and other embarrassments, which we will not detain your honors to enumerate, are predicable of nearly the whole of the property. That

on Wethersfield road is used for horticultural and botanic purposes, and has on it, besides old decayed houses, expensive structures suited to a public garden, and which could not be removed, and they would be of but little value to demolish.

From these and other causes produced by such a lapse of time, the property cannot now be rendered profitable under the present restrictions. The income of it is become almost nominal compared with what its value would yield if placed at interest, and thus the munificent intentions of the
43 testator are frustrated, and they will continue to be more and more so as the buildings decay and the property increases in value by lapse of years. Had the memorialists power to sell and convey in fee simple as the exigency may require from time to time, the embarrassments would be removed, and the interest of the owners and of the occupants would be mutually advanced.

The memorialists therefore humbly pray your honorable body to take their case into your wise consideration, and to enquire into the facts herein set forth, and to authorize a sale and conveyance of said property in fee simple under such guards and provisions as will secure the application of the proceeds in such manner as will carry into effect the intention of the testator, by ordering the same to be loaned on bond and mortgage or to be otherwise invested in safe and productive securities and the avails or product to be applied for the same uses and purposes as are specified in said will of the said William Stanley, deceased, or that your honors would grant such other relief as to your wisdom may seem meet. And they, as in duty bound, will ever pray.

44 Dated at Hartford, this 4th day of May, A. D. 1852.

In behalf of the Second Ecclesiastical Society in Hartford.

HORACE GOODWIN,
JAS. H. ASHMEAD,
SETH H. TERRY, *Agents.*
CHARLES WELLS,
By SETH TERRY, *Att'y.*
WILLIAM S. WADSWORTH,
JOHN BARNARD,
Trustees as above of the Stanley estate.

STATE OF CONNECTICUT, *ss:*

OFFICE OF SECRETARY OF STATE.

I hereby certify that the foregoing is a true copy of the file in this office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said State, at Hartford, this 12th day of October, A. D. 1864.

[L. S.] J. H. TRUMBULL, *Secretary of State.*

Filed 3d November, 1864.

45 United States of America Supreme Court, December term, 1864.

EZRA S. STANLEY, FREDERICK L. STANLEY, HENRY F. Stanley, and Edward A. Stanley, pl'ff's,
vs.
ELIZABETH JARVIS COLT, def't.

Errors filed in the office of the clerk of the Supreme Court of the United States this day of , A. D. 1864, to be assigned at the Supreme Court of the United States to be holden at Washington, on the first Monday of December, A. D. 1864, in a certain cause brought before said court by writ of error, wherein Ezra S. Stanley and Frederick L. Stanley, both of

Waltham, Henry F. Stanley, of Enfield, and Edward A. Stanley, of
46 Amherst, all in the State of Massachusetts, and all citizens of said State, are plaintiffs in error, and Mrs Elizabeth Jarvis Colt, of Hartford, in the State of Connecticut, and a citizen of said State of Connecticut, is defendant in error, in the record and proceedings of a suit that was in the circuit court of the United States in and for the district of Connecticut, held at New Haven, in said district, wherein said plaintiffs in error were plaintiffs and said defendant in error was defendant, to be brought before the said Supreme Court at Washington on the first Monday of December, A. D. 1864.

And the said plaintiffs in error, by T. C. & C. E. Perkins, their attornies, come into court and say that in the record and proceedings as aforesaid and also in the rendition of the judgment aforesaid there is manifest
47 error in this, to wit, that the said judge of said court at and upon the aforesaid trial of the said cause upon the general issue so joined between the parties aforesaid did not, as he was requested by the plaintiffs' counsel, charge the jury—

1st. That upon the facts found as set out in said bill of exceptions they should find a verdict for the plaintiffs.

And there is also manifest error in this, that the said judge upon the trial of the aforesaid issue did not, as he was requested by plaintiffs' counsel, charge the jury—

2nd. That the resolution referred to in and annexed to said bill af exceptions, as passed by the legislature of said State of Connecticut in the year 1852, was contrary to and in violation of the constitution of the
48 United States and the constitution of said State of Connecticut, and was therefore illegal, inoperative, and void, and that said legislature of said State of Connecticut had no power or authority to pass and enact said resolution.

Whereas, by the law of the land, the said judge ought to have charged the jury upon the trial of said issue to the effect of each and all of the foregoing two propositions next hereinbefore set forth, because the law is as is set forth in said propositions. And there is also error in this, for that by the record and proceedings aforesaid it appears that the verdict given on the aforesaid trial of the said issue between the said parties aforesaid, was given for the said defendant and against the said plaintiffs; whereas, by the law of the land, in case the said judge had charged the jury, as requested
49 by the counsel of the said plaintiffs, the verdict upon the said issue should and ought to have been given for the plaintiffs and against the said defendants.

And there is also manifest error in this, that the said judge upon the trial of the aforesaid issue did charge the jury—

1st. That upon the facts found as set out in said bill of exceptions they should find a verdict for the defendant.

And there is also manifest error in this, that the said judge upon the trial of the aforesaid issue did charge the jury—

2nd. That the resolution referred to in annexed to said bill of exceptions, as passed by the legislature of said State of Connecticut in the year 1852, was not contrary to and in violation of the constitution of the United
50 States and the constitution of the State of Connecticut, and was legal and operative, and that said legislature of s'd State of Connecticut had power and authority to pass said resolution.

Whereas, by the law of the land, the said judge ought not to have charged the jury upon the trial of said issue to the effect of each and all the foregoing two propositions, because the said is not as is set forth in said propositions, or any of them. And there is also error in this, for that by the record and proceedings aforesaid it appears that the verdict given on the aforesaid

trial of the said issue between the parties aforesaid, was given for the defendant and against the plaintiffs; whereas, by the law of the land, in
51 case the judge had not so charged the jury as last set forth, as he ought not to have done, the verdict upon the said issue should and ought to have been given for the plaintiffs, and against the defendant. There is also error in this, that by the record and proceedings aforesaid it appears that the judgment aforesaid was given for the said defendant and against the said plaintiffs; whereas, by the law of the land, judgment should and and ought to have been given for the said plaintiffs and against the said defendants. And thereupon the said plaintiffs pray that the judgment aforesaid for the errors hereinbefore set forth and others in the record and proceedings aforesaid may be annulled and held for nothing, and that
52 they may be restored to all things they have lost thereby, and that the said defendant may rejoin to the said errors.

By their attornies,

T. C. & C. E. PERKINS.

Filed 19th October, 1864.

SUPREME COURT OF THE UNITED STATES.

EZRA L. STANLEY, AND OTHERS,

vs.

ELIZABETH H. COLT.

Brief of Defendant's Counsel.

I.

THE lands in question having been devised by William Stanley, in fee simple, for the use and benefit of a religious society, the heirs of William Stanley can not recover them unless they can show that the devise was upon some condition, or (what is not pretended in this case,) that there was some limitation made in the will in their favor.

It would not be sufficient for the plaintiffs to make it appear that the lands had been diverted from the use for which they were devised, or that they had not been enjoyed by the beneficiaries in the particular manner prescribed by the testator, for where lands have been devised to a charitable use in fee simple, the heir has no more interest in, and no more right to, the lands than he has when they are devised to an individual in fee simple, either directly or in trust. The public have an interest in the execution of public charities,

and the beneficiaries have an interest, and if the directions contained in the will of the testator, either as to the manner of enjoyment or the objects who are to be benefited by his bounty are departed from, either the public or the beneficiaries, if they are sufficiently certain, and have a sufficient vested interest, may have a remedy.

But the heir has no interest and no right, and therefore can have no remedy.

It is necessary, therefore, for the plaintiffs to satisfy the court that some condition, the breach of which is attended with a forfeiture, was created by this will, for unless they can do this, their case has no foundation whatever.

There are certain elementary rules perfectly familiar to the court, but which nevertheless it is necessary to keep in view, that are to be applied in order to determine whether such a condition has been created by this will. The first is, that it depends upon the intention of the testator, to be gathered from an attentive examination of the will, not to be deduced from particular phrases having a technical import, but an intention to be deduced from an examination of all the provisions of the will which can have any bearing on the matter in question.

Another rule equally well settled is, that although the law allows testators to impose conditions subsequent, a breach of which will create a forfeiture, yet the law deems it improbable that testators will do so, and therefore leans against any construction which would result in such a condition. In order to create a condition the breach of which will work a forfeiture of a vested estate in fee simple, the intention to do so must be clear and unquestionable. The language employed must be such as to leave no doubt of the intention. Courts will not give it that effect by construction.

Mary Partington's case, 10 Coke, 42 a.
4 Kent 10 Ed. 150.
Norman v. Teagarden, 2 Ohio (N. S.) 380.
Newkirk v. Newkirk, 2 Caines, 345.
Wright v. Wilkin, 3 vol. Law Times, 507.
" " 4 vol. " " 221.

Words of proviso and condition will be construed into words of covenant when such is the apparent intention and meaning of the parties.

Clapham v. Moyle, 1 Lev., 155.
" " 1 Keb., 842.
Huff v. Nickerson, 27 Maine, 106.
Shep. Touch., 122.
2 Parsons on Cont's, p. 23.

Formerly courts of law did not recognize or admit the power of the court of chancery to enforce the performance of covenants and the execution of trusts, and therefore words which would not now be construed to import a strict condition, were allowed to have that effect when such a construction was necessary to give a remedy.

Wright v. Wilkin, 9 Jurist, 715.

Charities are highly favored in law, and they have always received a more liberal construction than the law will allow in gifts to individuals.

The same words in a will when applied to individuals may require a very different construction when they are applied to the case of a charity.

Story's Eq. §1165.

From these rules it follows that the plaintiffs must satisfy the court upon an examination of all parts of this will, that it was the purpose and intention of the testator to attach to this devise a condition upon a breach of which a forfeiture would take place; and this must be shown, not by measuring probabilities, not as an interpretation which may be the true one, but that such *must* be the true interpretation, and beyond all reasonable doubt.

Before entering upon an examination of the particular provisions of the will that relate to this point, there is a preliminary question which, if answered one way, would seem to be quite decisive of the case, in any aspect of it, and that question is, in whom was the legal title to the estate which was devised, vested by the will?

Was this a devise to certain trustees to hold and manage for the benefit of the society?

This question must also depend upon and be determined by an examination of the whole will.

We contend that the legal estate vested in the Trustees for the following reasons:

(1.) It is a rule of law that where trustees are named in a will, it is not necessary in order to find the legal estate vested in them to find a direct devise to them in the will.

It is not necessary that the testator should say in terms that he gives the legal estate to trustees. Nor is it necessary that he should describe the quantity of legal estate which he intends to give them.

If trustees are named the law looks to see what powers are conferred upon them, and what duties are required of them and then considers that it was the testator's intention to give them such a legal estate as would enable them to execute those powers and discharge those duties.

Webster *v.* Cooper, 14 How'd, 499.

2 Jarman on Wills, page 202.

2 Adolphus & Ellis, 206.

(2.) Taking this rule as a guide, and then looking at the several provisions in this will relating to this point, it will be found that such powers are conferred upon these trustees and such duties required of them as to make it beyond question necessary that they should take a legal estate to enable them to execute those powers and perform those duties. On the fifth page in the first clause of the will, are these words:

"I give and bequeath unto the Second Church of Christ in Hartford, such sums to be paid out of the profits and rents of my estate," &c.

Near the bottom of the 6th page at the 12th line, "It is my will that the first rents, profits or avails from said real estate, after it comes to *their possession*, be applied to the purchasing of the aforesaid Tankard."

In this immediate connection, in the next sentence, follows this direction: "It is my will that so much of the avails and profits next issuing out of my real estate my said trustees shall reserve in their own hands as shall be sufficient to purchase and pay for the one-half part of a proper bell for the meeting-house in said second society of the same weight and dimensions of that in the North meeting-house in the said town of Hartford, and be applied by my trustees for that purpose," &c.

Then in the next paragraph follows a provision for the appointment of his friends trustees to superintend, direct and manage said real estate, for the use and benefit of the said Second Society, in the manner above directed, with power to nominate their successors.

Then on the same page, in the second sentence from the bottom, after the provision for perpetuating the trust, he says: "and said trustees and their successors shall have full power to let and lease said estate, and to do all other legal acts for the well ordering and management of said estate under the limitations and restrictions as hereinbefore expressed."

Taking all these provisions together, we find that the testator appoints three of his friends trustees, that to these trustees he gives the possession of this real estate. He provides that they are to hold the estate and to rent the same, and receive the rents and profits, and to do all other legal acts for the well ordering and management of said estate. The office, powers, and duties of the trustees, like the trust, are made perpetual.

The trustees, and they alone, are to have the possession of this estate. The trustees, and they alone, are to have the power to lease and manage it. They are to collect the rents. They are to pay them over to the society; and, of course, to enable them to discharge these duties, and execute these powers, "and to do all other legal acts for the well managing of the property," it was necessary that they should take the legal estate, and therefore the law will presume that the testator intended them to take it, and will declare accordingly.

In order to show that there has been any breach of condition by reason of the alienation of this land, the plaintiffs themselves must show that the legal title was vested in trustees.

The conveyance of this land purports to have been made by four persons, three of whom were trustees under this will, and a fourth was a gentleman nominated by the Legislature, to represent the public interest. Upon these four persons, the Legislature, by their act, undertook to confer the authority to make this conveyance, and when they make the conveyance they say they act by force of authority conferred upon them by the Legislature.

The defendants contend that this act of the Legislature was unconstitutional and void.

They are obliged to say so, for if the act was constitutional, then the sale was legal, and passed a title to the property.

If the act was unconstitutional and void, and the legal title was in the corporation, it still remains there, and there has been no sale, and consequently no breach of condition.

The corporation could be divested of the legal title only by a conveyance made in the name of the corporation, and under the seal of the corporation, by some person expressly authorized by the corporation to make it.

The agents of the corporation, as such, have no power to convey the real estate of the corporation. But this conveyance was not made by these persons under any authority conferred on them by the corporation. They did not affix the seal of the corporation. They say in the deed that they act by virtue of authority conferred upon them by the act of the Legislature.

It would seem to be very clear then that if, by the terms of the will, the legal title to the land vested in the society, and if the act of the Legislature is void, as the plaintiffs claim it to be, the legal title still remains in the society, and there has been no breach of condition.

We have said that the plaintiffs, in order to recover, must show that the devise was upon some condition, the breach of which would be attended by a forfeiture. We have referred to the rules of construction, by which the question whether

such a condition was or was not annexed to the devise, must be determined, and it seems to us to be necessary to ascertain in whom the legal title to the land in question vested, in order to decide correctly this as well as other questions which arise in the case. We have endeavored to show that it vested in the trustees appointed by the testator.

We submit now, with great confidence, that upon the whole will, and looking at all its provisions, no such condition can be found. It is said by the plaintiffs that the word "provided," which is found in this will, raises a condition, and they cite authorities to show it. It is true that this word in certain connections, and under certain circumstances, is competent to raise a condition, and it is equally certain that the same word used in a different connection, and under different circumstances, will not create a condition. The court will therefore seek to discover the intention of the testator in this particular, not by considering what legal force some particular word in the will might have in the abstract, but by looking at all the provisions of the will, and the connection in which the word is used, and thus from an examination of the whole, will ascertain the sense in which the word was probably employed by the testator.

On the face of this will, it is plain that the Second or South Ecclesiastical Society were the objects of the testator's bounty, in respect to this land, and that he intended this bounty to be perpetual. He not only gives it in fee, without any devise over in any event, but he says that "he devises this land to be and remain to the use and benefit of said Second or South Ecclesiastical Society, in the town of Hartford, and their successors forever."

He then appoints trustees, with power to fill any vacancies that may from time to time occur, and thus to perpetuate the office, and then says, on the sixth page in the third sentence from the bottom, "all persons, successors hereafter to said trust and office, shall at all times in future, have like power to superintend, direct and manage said estate, for said society, and in like manner to nominate and appoint their successors in said trust and office, and to *perpetuate said trust* for

the benefit and use of said society, as occasion may from time to time require."

Now if we keep in view this manifest intention of the testator to create and perpetuate a trust for the benefit of this society, a trust which he expected would endure forever, and consider that it was also his purpose to give very particular directions for the administration of it, and then carefully observe the connection in which this word "provided" is used, it must, we think, be evident, that the testator could not have used the word in the sense claimed by the plaintiffs.

Thus on page six, first paragraph, the testator says, "after the decease of my sister, Abigail Whitman, I give and devise the whole of my real estate of every kind and description, except what is hereinbefore given unto my neice, Abigail Whitman, unto the Second or South Ecclesiastical Society, in the town of Hartford, to be and remain to the use and benefit of said Second or South Ecclesiastical Society forever." But the Society is not to have the management and control of this property; the society is not to have the power to lease it and receive the rents and profits directly. The entire management and control of it the testator intends to give to certain trustees to be appointed by him, and intends to have these trustees execute their trust according to his directions; therefore the testator, after the words last quoted, and in the same sentence, proceeds to give those directions, and says: "provided, that said real estate be not ever hereafter sold or disposed of, but the same be leased or let, and the annual rents or profits thereof applied to the use and benefit of said society, and the letting, leasing and managing of said estate to be under the management and direction of certain trustees hereafter named by me, and their successors, to be appointed in like manner as hereinafter directed." (These directions here referred to by the testator, will be found in the next paragraph.) It will be observed that every word here quoted is directly and essentially connected with this word "provided," which is supposed to create the condition. If there is *any* condition here, then it is plain that there are *several* conditions, and if a breach of

one would cause a forfeiture of the estate, it must be admitted that the same result would follow from a breach of any other. The plaintiffs say, there is a condition against alienation, the breach of which will cause a forfeiting of the estate. If so, there is a condition that the estate shall be leased or let, and also that the annual rents and profits shall be paid to the society, and also that the leasing, letting and managing of the estate shall be under the direction of trustees appointed by the testator, "*in manner as hereafter directed*," the breach of either of which conditions would likewise cause a forfeiture of the estate; yet it is most improbable that the testator should have devised this estate to this society, and endeavored to impress upon his bounty perpetual duration, and should have hedged it about by so many careful and minute directions as to its control and management, and should at the same time have intended that the society should forfeit the estate in case his trustees whom he had appointed to control and manage the estate, and in whom the legal title was vested, should be guilty of a breach of trust in violating any of these provisions. We submit that such could not have been the intention of the testator. What we say is, the true interpretation of this will, in this particular, is this: The testator here creates a trust for the letting, leasing and managing of this estate, and appoints trustees. It was his intention to give directions to those trustees for the management of it; they were not to sell but to lease it, and that the language which is supposed to raise the condition, occurs in the course of the directions he gives to his trustees, and was not used with any intention of creating a forfeiture in case the trustees should fail to obey those directions, or commit a breach of trust. Thus on the fourth page, line fifth, we find these words, "and said trustees and their successors shall have full power to let and lease said estate, and to do all other legal acts for the well ordering and managing of said estate, under the *limitations and restrictions* as hereinbefore expressed." Now these limitations and restrictions are, that they should not sell, that

the estate should not be divided in case part of the society should secede, that they shall lease the estate, but shall not give a lease for more than thirty years. Undoubtedly he desired that these directions should be strictly obeyed, but that the testator intended that the society should forfeit the estate in the event that the trustees should disobey any of these directions, can not be maintained with any plausibility.

There have been some recent decisions having an important bearing on this question. In the case of Chapin *v.* Harris, 8 Allen's Mass. Rep'ts, 594, a writ of entry was brought to recover certain real estate and water power, the title to which the plaintiff claimed had reverted to him by reason of the breach of a condition annexed to the land. The clause in the deed which was claimed to raise the condition, was as follows: "Provided said draw shall be so built as to answer for a street to the railroad, and Spring street is to be opened three rods wide across said farm, to the south line of said railroad, and the said Stearns is to make the road." The court decided that this clause did not raise a condition, the breach of which would be attended by a forfeiture of the estate, and among other things they say, "It is true, as the demandant contends, 'provided' is an apt word to create a condition, and it is often used by way of limitation or qualification only, especially when it does not introduce a new clause, but only seems to qualify or restrain the generality of a former clause." Such is the connection in which the word is used, and such its office in the case at bar.

Another case to which we desire to call the particular attention of the court, is Wright *v.* Wilkin. The first time it came up, it was decided in the Court of King's Bench, and is reported in the ~~3d vol. Law Times, 507, and 7th vol. of Jurist, N. S., 441.~~ 2 Best & Smith 232

A testator, after bequeathing legacies devised to the defendant and to his heirs, &c., "all the real estate," and all the "residue of his personal estate," *upon this express condition*, "that if my personal estate should be insufficient for the purpose, they do and shall within twelve months after my decease, pay and discharge the legacies before bequeathed,

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5 House Lords
14 Beav 357

and I feel confident that he will comply with my wish, it being my particular desire that the above legacies shall be paid, and I hereby make chargeable all my said real and personal estate with the payment of the aforesaid legacies."

It was held, "that the above devise was not upon a condition, the failure to comply with which created a forfeiture, but merely a charge or trust in favor of the legatees."

This case went by appeal to the Judges in the Exchequer Chamber, where it was learnedly and elaborately argued, and is again reported in ~~4 Law Times, 221, and in 9th Jurist, N. S., 915.~~ The court decided that this was not a condition, but was a trust, and that although these words, "upon this express condition," if they had stood alone, would have created one, yet when the testatrix went on to say, that she trusted to his good faith and honor to pay them, and very much desired that they should be paid, and when afterwards she said she made them a charge upon her personal and real estate, that was inconsistent with the idea that she intended the property should be taken away by condition, because there was a trust to be fulfilled, and that inconsistency was so great that they held that these words, "upon this express condition," must yield, and the trust must be fulfilled, but the legal estate must remain unaffected by the words of condition."

2 Best & Smith 232

We submit that there are very important deductions to be drawn from these decisions, if they are law. In the first place, they say, (as we submit the law clearly is,) that the case is not to be decided by looking to particular provisions in the will, but by looking at the whole will to ascertain the intention of the testator.

In the second place, they say that words much stronger than those used in the will in question, will be controlled, if the court can see that there was an intention to create a trust, and that the trust will be defeated if the words shall be held to create a condition instead of a trust. That there was an intention to create a trust here, does not admit of controversy.

The testator appoints trustees and provides for perpetuating the trust, for the use and benefit of the society. Could it then have been his intention at the same time that he

created this trust, and said it was to be perpetual, to insert a provision by which it could be defeated at the will of the trustees?

II.

The next point which we desire to submit to the court is, that if this is a condition it is void as being in restraint of alienation.

The law on this point is so well settled as to render any reference to authorities unnecessary. If this was an ordinary devise, either to an incorporation or an individual, a condition against any alienation of the property devised would be merely void as contrary to the policy of the law.

But it is attempted to distinguish this case from such cases by saying that this is a devise to a charitable use, and that under the statute of Connecticut concerning the dedication of lands to pious and charitable uses, it is competent for testators to provide that the lands shall be for ever held and never alienated by any human power or authority.

In the first place we say that this is not a devise under the statute of Connecticut. In the next place, if it were, that statute has not empowered devisors to make such conditions.

1. Upon the question whether this devise is within the statute of Connecticut we rely upon Seymour *v.* Hartford, 21st Ct. Repts., 481. That was the case of a deed of land to this same society by Anne Burnham, dated July 7th, 1862. The land was conveyed in these words: "I therefore by these presents fully, freely, and absolutely give, grant, release and confirm unto the said South Church or Society called Congregational, and to their successors for ever, all the aforesaid house, homestead and premises, with their appurtenances, to have and to hold unto them and their successors for ever, as a good, sure and indefeasible estate in fee simple, without any manner of condition." A part of the land included in this deed came by sundry conveyances to the plaintiff. The town of Hartford had laid a tax on it, and compelled him to pay the tax. The plaintiff then brought this action to recover back the money

thus paid, claiming that this land was not liable to taxation, on the ground that by the deed of Anne Burnham it was granted "for the maintenance of the ministry of the gospel," or for some other public and charitable use, within the meaning of the statute of 1702, and therefore by the express terms of that statute was exempt from taxation.

This claim was not sustained by the court, and it was decided that the mere fact that the conveyance was to an ecclesiastical society did not bring it within the provisions of the statute. That the statute requires the grantor to dedicate the property to some of the particular uses therein specified, and the general character and corporate powers of an ecclesiastical society do not imply that it is dedicated to any of those uses; for whatever implication might be drawn from the general character and limited powers of the corporation at the time when the grant is made, yet that character and those powers might be thereafter essentially changed by the legislature. That the statute requires the grantor to declare the use, and he can not leave it to the law to do it for him.

It was therefore expressly decided in that case by the highest court of the state of Connecticut that a grant of land to this society, or to any ecclesiastical society, without any other declaration of the use than may be implied from the character of the grantee is not within the statute, because it is not a dedication or sequestration of land to any of the uses specified in the statute. That case is decisive of the case at bar, for the material facts are the same in both. The devise in question was to the use of the society and to no other use. It is quite immaterial for the purpose of this point whether the legal estate vested in the society, or in trustees for the use of the society. The question is, to what use was the property dedicated? And we find, as in the case of Seymour *v.* Hartford, that it was dedicated to the use of this ecclesiastical society with no restriction upon them as to the application of the income. This the court say is not enough to bring the case within the statute. And to the same point see Doe *v.* Copestake, 6 East's Repts., 321. We say then, that this devise is not within the statute of Connecticut in relation to

public and charitable uses. And we say in the second place, if it were, a condition in restraint of alienation would not be a valid condition, the breach of which, by authority of an act, the legislature would work a forfeiture, because that statute does not authorize a grantee or devisee to impose such a condition.

In order to show that it does the plaintiffs must maintain and must show to the court that this statute not only repealed the statutes of Mortmain existing in England before the emigration of our ancestors, and which upon general principles would be brought over to this country by them, but authorized any proprietor of land to sequester it for ever, to render it inalienable for ever, and to take it out of commerce for ever.

This, we submit, can not be shown.

In the case of the Bible Society *v.* Wetmore, 17 Ct. R., 181, it was decided that this statute of 1702 was virtually a re-enactment of the statute of Elizabeth.

Under the statutes of Mortmain a devise to a corporation or to the use of a corporation, whether lay or ecclesiastical, was void.

2 Kent's Com., 10th Ed., p. 342.

Mr. Shelford says: "It has been a question of grave import and difficult solution whether a corporation instituted as a charity could be permitted to become the *cestui que trust* of lands devised for charitable uses."

Shelford on Mortmain, 350.

These statutes were merely confirming and enabling acts, like statutes, to enable aliens to hold lands, and confirming grants previously made to them.

The Connecticut statute, commonly called the statute of 1702, was passed at the October session of the General Court, 1684, and was as follows:

"For the encouraging of learning and the promoting of publique concernments, it is ordered by this court, that for the future, that all such houses and lands as are, or shall, by

any charitable persons be given or purchased for, or to help on, the maintenance of the ministry or schools, or poor, in any part of this colony, they shall remayne to the use or uses for which they were given forever, and shall be exempted out of the list of estates, and be rate free, any former law or order notwithstanding."

The history of this law is instructive upon the question of its interpretation, and clearly shows, we think, that we are correct as to the object of it.

The charter granted by Charles II. constituted the only title of the colony to the lands within its limits, the Indian titles which they had acquired from time to time previous to the grant of the charter being, as Governor Andross said, no better than "the scratch of a bear's paw."

The Colonial legislature or General Court had, however, before the grant of the charter, assumed to make numerous and large grants of land to townships, individuals, and for public, charitable and pious uses. The charter conveyed to the colony in fee simple all the lands within its boundaries, but at the time the statute in question was passed, the grants made by the colonial legislature before the charter was granted had not been confirmed. The efforts which were being made to deprive them of their charter created the greatest anxiety and alarm in the colony. While they were in no danger of losing their charter, a confirmation of these grants by the colonial legislature was not deemed important, as soon as the people discovered that they were in danger of losing their only muniment of title, they deemed it important to confirm them by law, while they yet had power to do so.

Under these circumstances the statute in question was passed at the session of the General Court, held in October, 1684.

In February of the ensuing year, James II. succeeded to the crown, and at the following May session of the General Court, another statute was passed, of the following tenor: "This court, for the prevention of future trouble, and that every townships' grants of lands as it hath been obtained by gift, purchase, or otherwise, of the natives or grant of this court,

may be settled upon them, their heirs, successors and assigns forever, according to our charter granted by his late majesty of happy memory; this court doth order that every township in this colony shall take out patents for their said grants of the Governor and Company, &c.

The like course may be taken for all farms granted to any person or persons whatever within this colony."

3 Trumbull's Col. Rec., 179.

The fears of the colony were well founded, for in June of the same year, a *quo warranto* was issued to the governor and company of Connecticut, citing them to appear before the king within eight days of St. Martin, but this writ was not served until after the day named for their appearance had passed. On the 21st of December of the same year another writ was issued, citing them to appear before the king within eight days of the Purification of the Blessed Virgin.

These facts, some of which are matter of history and others gathered from the records of the colony, show beyond any question that the object of this statute was to confirm existing grants to the uses specified in the statute, and to authorize future grants to the same uses by exempting them from the operation of the English statutes of Mortmain, and placing them on the same footing merely as grants of land to individuals, or for any other lawful purpose, and not with any view to render lands so granted for ever inalienable.

It is said that because this statute was in conflict with the English statutes of Mortmain, and might on that ground be made an additional cause of complaint against the colony, it was not recorded with the other public acts at the time it was passed, but withheld from record for several years until the agitation in respect to the charter had ceased. It first appeared among the public acts in the revision of 1702, and thus came to be called the statute of 1702. In the revision the phraseology of the act was slightly changed. The following is a copy of it: "*An act for securing estates given to charitable uses.*" "Be it enacted and ordained by the authority aforesaid, that all such lands, tenements, hereditaments and other estates that either formerly have been or hereafter shall

be given or granted either by the General Assembly of this colony, or by any towns, villages, or particular person or persons, for the maintenance of the ministry of the gospel in any part of this colony, or schools of learning for the relief of poor people, or for any other public and charitable use, shall forever remain and be continued to the use or uses to which such lands, tenements, hereditaments, or other estates have been or shall be given, according to the true intent and meaning of the grantors, and to no other use whatsoever, and also be exempted out of the general list of estates, and free from payment of rates."

The words of perpetuity here employed are those only which in substance are employed in all deeds and grants, and such as it is customary and proper to employ where titles are to be confirmed by statute, and where natural or artificial persons incapable of holding lands are authorized by law to do so.

Our views in regard to the object and true construction of this statute are further confirmed by the history of a case that arose very soon after the act was passed.

In 1689, John Liveen, of New London, died, leaving a will made just before his decease, by which he bequeathed and devised the greater part of his estate to the "ministry of New London," to be improved for them by his executors, who were General Fitz John Winthrop and Major Edward Palms. The executors treated the devise as void, on the ground that it was within the English statutes of Mortmain, and they contended that the Connecticut statute of 1684 was void, because in conflict with the laws of England.

A suit was brought against the executors by the town of New London on behalf of the ministry, and the town recovered judgment. The cause was taken by appeal to England, and was in litigation there for several years, but the records of the colony do not disclose the result.

We have already shown that the Connecticut statute of charitable uses has been held by the Supreme Court of that state to be substantially a copy of the statute of Elizabeth concerning charitable uses, both should therefore receive the same construction, but it has never been held in England that

lands given to charities were thereby rendered inalienable. On the contrary it has always been the practice of the Court of Chancery to order a sale of such lands when a sale is shown to be for the interest of the beneficiaries.

Park's Charity, 12 Sim., 329.
Exparte the Gov. &c., 13 Law and Eq., 145.
Att'y Gen. *v.* Hungerford, 2 Clk. and F., 145.
" " *v.* Kerr, 2 Bev., 428.
Archbishop of York's Case, 17 Bev., 428.
Re Colsten Hosp., 27 Bev., 17.

The law on this subject is thus stated by Mr. Shelford:

"There is no positive law restricting the alienation of estates given to charitable uses. The trustees in whom such estates are vested, may at law make an absolute disposition; but if it be imprudent or injurious to the interests of the charity, the transaction will be set aside in a court of equity as a breach of trust.

The alienation of charity estates not improvident but beneficial to the charity, and conformable to the rules which ought to guide the trustees, may be good. The principle that govern all these cases is this, that the trustees are bound to a prudent administration of the fund for the benefit of the charity."

The Conn. Stat. being a re-enactment of the Stat. of Eliz., should, as we have said, upon general principles, receive the same construction, and it always has received the same construction by the Legislature of the Colony and of the State, in the exercise of the jurisdiction in regard to the sale of charity lands exercised in England by the Court of Chancery.

The records of the State show that between the years 1670 and 1862, 575 private acts, authorizing the sale of lands, were passed. A great number of these acts were for the sale of charity lands. The following are a few of the more modern cases: In 1713, lands given by Robert Bartlet for the use of a school, were ordered sold, and the proceeds re-invested.

In 1835, the First Baptist Church in Saybrook was authorized to sell lands devised for pious uses.

In 1846, six petitions for the sale of charity lands were granted.

In 1847, the Universalist Society of Westchester were authorized to sell lands given for religious uses, and the Baptist Church in New Britain were empowered to sell lands devised for a Parsonage.

In 1850, the Second Ecclesiastical Society in Saybrook were authorized to sell lands given for the purpose of supplying the minister with wood.

The Ecclesiastical Society in Fairfield was authorized to sell lands devised for a parsonage. The Methodist Church at Danielsonville was authorized to sell lands given for religious uses, and the Bacon Academy at Colchester was authorized to sell lands devised for the use of the academy, although the devisor expressly prohibited such sale.

In 1853, Greenfield School District was authorized to sell lands.

In 1857, the Baptist Church at Saybrook was authorized to sell lands.

In 1858, the Second Ecclesiastical Society in Enfield was authorized to sell lands.

In 1860, St. Paul's Parish was authorized to sell lands. In all these cases the lands had been devised to pious or charitable uses. And it does not appear that the validity of any of these sales was ever questioned.

This list of precedents was referred to in the trial of this case in the Circuit Court, and if it is inaccurate, the counsel for the plaintiff will probably be prepared to point out and correct any error that may have been made.

Charities are under the perpetual guardianship of the sovereign power. The general superintendence of them in England is delegated to the Court of Chancery.

3 Blackstone, 427.

Story's Eq., §1149.

Vidal *v.* Girards, Exrs., 22 How., 195.

In Connecticut this superintendence is mainly exercised by the Legislature. In Connecticut, as in England, it is a

rule of public policy to require trustees for a charity to obtain the assent of the public authority exercising this guardianship, to a sale of charity estates, in order to protect the charity against imprudent sales. This, and this alone, is the object of the law. It is a rule established for the protection of the *cestui que trust*.

Lands (as we have endeavored to show,) are not rendered inalienable by being given to charitable uses, but set apart as constituting a fund to be used in a provident and judicious manner, to promote the object for which they are given, and this provident and judicious manner as much requires a sale, when by a change of circumstances the property has become unproductive, but can be made productive by a sale, as under other circumstances it requires the property to be preserved and kept.

When the statute says therefore that lands given to charitable uses, "shall forever remain to the uses to which they have been or shall be given or granted, according to the true intent and meaning of the grantors, and to no other use whatever," it is to be understood not as meaning that the land should never be sold, not as giving the donor power to say that, but a providing and declaring that the fund shall never be diverted from the use to which it may be dedicated, subject, however, to such changes from time to time as the interest of the society may require.

A statute which rendered all charity lands forever inalienable, or which gave the donor power to render them so by imposing conditions against alienation, would be so clearly contrary to public policy that the court would never so construe it if it admitted of any other rational interpretation.

We say in the next place that it can not be presumed that this testator intended to impose a condition against a legislative sale, even if he did against a sale by his trustees or by the society.

When this will was made, the Charter of Chas. II. was the organic law of the State. Under this charter the General

Assembly had the same power of legislation as the Parliament of Great Britain.

Starr *v.* Pease, 8 Ct., 548.

Pratt *v.* Allen, 13 Ct., 119.

In the first case, Judge Daggett says of the Charter, "It gave very extensive power to the Legislature, and left too much, (for it left everything, almost,) to their will."

The authority of the Legislature then, at the time the will was made, to authorize a sale of this land, can not be doubted.

The testator knew that whatever his wishes might be in regard to a sale, the Legislature had power to authorize a sale, and that a sale by authority of law would not work a forfeiture.

He knew that a condition against the exercise of their powers would be void, and it must therefore be assumed that he made his will and imposed this condition (if it be a condition,) in ~~subrogation~~ subordination to the power of the Legislature to order a sale. That he did not intend by a condition to restrain a legislative sale, but a sale by his trustees or the society by their own mere authority.

Clark's Ex'rs *v.* Hayes, 9 Gray, 429.

III.

Assuming that this was a conditional devise, and that the condition was valid, if (as we have endeavored to show,) at the time when this will was made, and when the trusts of the will took effect, the Legislature had power to authorize a sale, and to control, in this respect, the intention of the testator, it must be admitted that the Legislature possessed the same power when it did authorize a sale, unless in the meantime it had been deprived of it by some constitutional restriction. It is for the plaintiff to show that by some provision in the constitution of the United States or of the State of Connecticut, the Legislature of Connecticut was prohibited from the exercise of this power, and that the act in question was therefore void.

It is a well settled and familiar principle of law that a court will not declare an act of the Legislature void unless it is manifestly in violation of some constitutional provision.

13 Ct., 103.
" 132.
State *v.* Wheeler, 25 Ct., 297.
Calder *v.* Bull, 3 Dall., 398.
Cooper *v.* Telfair, 4 Dall., 19.
1 Kent, 10th, 448.
Cochran & Van Surlay, 20 Wend., 381.
2 Barb., 490.
Butler *v.* Palmer, 1 Hill, 324.
Sharpless *v.* the Mayor, &c., 21 Penn., 147, 160
1 Baldwin, 74.
Hartford Bridge Co. *v.* U. Ferry Co., 29 Ct., 227.

And the act must be shown to be a clear and unequivocal violation of the constitution. That it is so, can not be established by doubtful and argumentative implication.

4 Dal., 119.
21 Penn., 160.

The Constitution of the State of Connecticut is not a grant of legislative power; it is merely a limitation imposed upon pre-existing power.

Starr *v.* Pease, 8 Conn. R., 548.
Pratt *v.* Allen, 13 Conn. R., 119.

Allowing the utmost latitude of interpretation consistent with these principles, and it will yet be difficult, we submit that it will be impossible to discover any provision in the Constitution of Connecticut that has any bearing on the question before the court.

It may be claimed that the law in question is made to operate on past transactions, and is in that sense an "*ex post facto law.*" Admit that it does, yet as it is not a law attaching penal consequences to past transactions, it is not for that reason void. We need not cite authorities to prove this. The provision that the accused in criminal cases shall not be deprived of life, liberty, or property but by due course of law, can not possibly have any reference to the case at bar.

The provision that "the property of no person shall be taken for public use without just compensation therefor," is equally irrelevant. The Constitution of Connecticut, then, is silent on this subject. But let it be assumed that it is beyond the scope of legislative power to pass a law taking away or impairing a vested right of property, and that upon general principles, such a law would be void, and then let us inquire whether the act in question is of that character.

A right of property, in order to be within the protection of this principle, must, we submit, not only be a vested right, and not a mere possibility, it must also be a beneficial interest. If, as we claim, and have endeavored to show, the legal title of the land vested in the trustees, the heirs of the testator could have no beneficial interest in a breach of condition by the trustees. "No neglect, misapplication of funds, or other breach of trust will give a right to the heirs at law to call upon a court of equity to declare a resulting trust for themselves, and they have no pecuniary or beneficial interest accruing from the non-execution of a trust."

Sanderson *v.* White, 18th Pick., 333.

Suppose there had been no act of the Legislature, and the heirs at law had entered for condition broken, all he would gain by an entry would be the naked right to hold the legal estate for the beneficiaries, till a court of chancery should exercise the power of appointing new trustees.

Therefore, if the court should come to the conclusion that the legal estate was vested in these trustees to hold upon trust, and that there was a breach of a condition attached to that legal estate, and an entry by which the heir vested himself with that legal estate, but for the act of legislature, there can not be the least difficulty in saying that the Legislature might control that interest either before or after breach.

But if the court should come to the conclusion that the legal estate vested in the society and not in the trustees, we respectfully insist that the heirs-at-law of the testator, by virtue of a condition against alienation, would not in that

case, before condition broken, have an interest in the property beyond the control of the Legislature.

Admitting that the power of the Legislature is so far limited and restricted by general principles of law that it cannot by any act of legislation destroy or impair a vested and beneficial right in property, it would not follow that the act in question was void.

The plaintiffs in order to show to the court that this act was void must go much further than this, and maintain that the power of the Legislature is so limited and restricted that any act is void, the effect of which would be to destroy or impair, (for whatever cause,) not a vested and beneficial interest in property, but the most remote and contingent interest. The interest of which they claim this act deprives them, was both contingent and remote, a mere possibility of reverter, and so little regarded by the common law that it could not be conveyed or devised.

Smith *v.* Readell, 19 Ct., 111.

4 Kent's Com., pp. 11, 127, 447.

1 Washburn's Real Prop., 52, 451.

This, we say, the plaintiffs can not show, either upon principle or authority.

It can not be maintained that the Legislature of Connecticut has any less power to unfetter estates by cutting off remote and contingent interests of this character, than the Court of Chancery in England; certainly in no country are the rights of property more respected or better protected, yet it is a well settled practice in that court to exercise this power.

In Platt *v.* Sprague, 2 Vernon, 303, trustees were ordered to join in cutting off a contingent remainder to the heir at law. Again: in Fruwin *v.* Coulton, 1 Eq. Ca. Abr., 386, also in Huntington *v.* Forly, 1 P. Williams, 536. Tapping *v.* Piggot, 1 Eq. Ca. Abr. is a very strong case. There the trustees without any order of the court joined in making a new settlement, thereby cutting off a contingent remainder to the heir at law. On a bill filed by the heir at law to have this new settlement set aside, the court declined to set it aside, the chan-

cellor saying that although it was an imprudent thing for the trustee to do without the sanction of the court, yet as he approved of the settlement he would not disturb it.

In these cases the right of which the heir at law was deprived by the court was a mere naked possibility.

In this case the right of which the heir at law has been deprived by the legislature was a mere naked possibility.

In this country laws affecting such contingent rights in property have never been held to be beyond the scope of legislative power. Cases sustaining such laws are very numerous. We shall refer to only a few of them. Thus it has been held that the legislature might take away a contingent right of dower or courtesy.

Strong *v.* Claw, 12 Ind., 37.

Thurber & Stevenson *v.* Townsend & Wilbur, 22 N. Y., 517.

Also the contingent right of the husband in the choses in action of the wife.

Barbour *v.* Barbour, 46 Maine, 9.

Clark *v.* McCreary, 12 S. & M., 347.

Also the possibility of reverter to the owner of the fee, in land taken for a street in a city, on the ground that the interest thus taken is too remote to be deemed an interest, in property of any value.

People *v.* Kerr, 27 N. Y., 188.

In De Mill *v.* Lockwood, 3 Bradfords C. C. R., an act of the legislature by which an estate in fee tail was declared to be a fee simple in the grantees of the tenant in tail who were infants, and which authorized a sale of the land, was declared to be valid.

The Court say: "The legislature would have had a right by a general law to declare every fee tail to be a fee simple, and after such general law an estate in fee tail would in the tenant in tail be converted into a fee simple. The legislature by so doing would not take any right of property from any one and vest it in another. They would not take any strict legal right from any one. For the issue of the donor in tail has no strict legal right till after the death of such donor.

During the life of such donor such issue has no right in the entailed estate which can be conveyed, but only a possibility, or expectancy, or capability of inheriting. If this could be done by a general law it could be done by a special law."

A law empowering a Court of Equity to order the sale of real estate owned in common, where partition would not in the opinions of the court be advantageous to the owners, has been held to be valid.

Richardson *v.* Munson, 23 Ct., 94.

In this case the court say: "It is claimed that it (the statute) authorizes the court upon the application of one or more tenants in common, and representing as in this case a small minority of interest, to compell the sale of the rights of all others, depriving them *in invitum* of their property merely to accommodate others, and without reference to the public interests. There may be extreme hardship in this act; is it therefore unconstitutional?

"The instances are common wherein it becomes necessary to cause the sale of real estate without the concurrence or consent of the proprietor; and statutes authorizing this are to be found in every state; as in the case of the sale of minors' lands, and the lands of idiots, lunatics, and persons under conservators and guardianships." No constitutional objections to any such statutes have been urged.

In Black *v.* Walker, 6 Ct., 190, it was held that a statute validating the levy of execution in cases where the levy was void, for the reason that the officer had included in his return fees not allowed by law, was valid.

Hosmer, C. J., in delivering the opinion of the court declares the validity of the act in very emphatic language. Among other things he says: "This law is undoubtedly retrospective, but is it unjust? A law although it be retrospective, if conformable to entire justice this court has repeatedly decided is to be recognized and enforced.

Goshen *v.* Stonington, 4 Ct., 209.

Mather *v.* Chapman *et al.*, 6 Ct., 54.

Every act of the legislature intrinsically implies an opinion that the legislature had power to enact it, and the judiciary

will discover sufficient promptitude if it determine a law to be invalid that operates by retrospection unjustly on person or property.

This principle shows a correct medium admitting the sovereignty of the legislature to do justice by an act unquestioned by the court of law; which while it equally repels the supposed omnipotence of the same body to require the observance of an unjust law in the subversion of fundamental rights and in opposition to the social compact.

The question is not free from difficulty, but unless the doctrine sanctioned by the court be embraced, this extreme would be resorted to; that every retrospective law, however just and wise, affecting the property of an individual, must be considered as of no validity, and thus in cases the most equitable and salutary, the judiciary must deny the legislative right to pass a law oppressive to no one, and promotive of entire justice, and this upon the authority of general principles. I am not speculatist enough to yield my sanction to this course of proceeding."

It must be admitted that the act under consideration in that case was not only retrospective, but affected essentially vested rights of property; yet inasmuch as those rights of property were not unjustly affected, the act was declared to be valid.

In Starr *v.* Pease, 8 Conn., 541, a private act of the legislature, divorcing Mrs. Lewis from her husband, on the ground that he had been guilty of improper familiarities with another woman, was held to be valid, though its effect was to deprive a creditor of the husband of a vested estate in the lands of the wife acquired by the previous levy of an execution on the husband's estate therein.

In Holbrook *v.* Finney, 4 Mass., 568, Annable *v.* Patch, 3 Pick., 363, and Bambaugh *v.* Bambaugh, 11 S. & R., 191, it was decided that a law that changed the tenure of estates by declaring all joint tenancies to be tenancies in common, was constitutional and valid.

Private acts authorizing tenants for life and trustees to support remainders, to sell real estate devised, and convert the

same into personal estate, to be held subject to the same provisions and trusts as the land, are numerous, and have always been sustained, though in opposition to the will of the testator; and although the effect was to compel those in remainder to take personal estate instead of the real estate devised, and in which they had both a vested and valuable interest.

Norris *v.* Clymer, 2 Barr, 284.

Blagg *v.* Mills, 18th C. C. R., 427.

Soheir *v.* Massachusetts General Hospital, 3 Cush., 483.

Rice *v.* Parkman, 16 Mass., 326.

Clark *v.* Van Sarlay, 15 Wend., 436.

In the last case Judge Bronson, who delivered the opinion, says: "The counsel also referred to that clause of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, but I have not been able to perceive that it has any bearing on the question before the Court."

It can not be denied that in each and all of these cases the law took away or modified and controlled interests in property more immediate and tangible than any which the plaintiffs had under the will in question.

From the whole tenor of the will it is apparent that this Society was the sole object of the testator's bounty in respect to the land in question, and that this condition (if there be a condition) was imposed for the purpose of protecting the Society in the enjoyment of it, and not to enable the heir at law to deprive them of it.

There is no limitation in favor of his heirs at law, no devise over, nor any other provision in the will tending to show that the testator ever intended or expected that his heirs at law would succeed to the estate in any event.

As we have said, it must be presumed to have been the intention of the testator that the Society should derive the greatest possible benefit from the estate which he gave them, and he supposed this would be derived by adhering to his plan for managing it. But in the progress of time a large city grew up around this land, and while the surrounding real estate had become valuable and productive, this remained com-

paratively valueless and unproductive, owing to the restrictions which the testator had imposed on his trustees in respect to its management.

The interests of the beneficiaries and of the public alike required that the land should be sold. The legislature on finding that the representations of the Society and the trustees were true, authorized a sale, taking great care, however, to provide that the avails should be securely invested in "bonds and mortgages of real estate of double the value of the amount invested," and that the income should be paid over to the treasurer of the Society, and be appropriated to the use of the Society, "in the same manner and subject to the same use as the rents or income of said property are by said will required to be appropriated, and for no other use or purpose whatever."

From the authorities already cited it appears that it is the constant practice of the legislature where the power has not been delegated by the legislature to the courts, and of the courts where the power has been delegated, to authorize a sale of the lands of infants, idiots, lunatics, and others who are not *sui juris*. This is done in the exercise of a tutelary authority on the part of the legislature as *parens patrie*.

C. J. Parker says: "This power must rest in the legislature in this Commonwealth, that body being alone competent to act as the general guardian and protector of those who are incompetent to act for themselves." Rice *v.* Parkman, 16 Mass., 328. In Soheir *v.* Massachusetts General Hospital, 3 Cush., 483, a testator devised real estate to his children, the shares of the daughters to be held by trustees, and the income paid to them during their lives, and at their decease it was to go to their issue or heirs at law. The legislature of Massachusetts authorized a sale, and a question being made as to the title, the case was submitted to the court on an agreed state of facts.

Among other things the court say: "The legislature authorizes the sale, taking care that the proceeds shall go to the trustees duly appointed in pursuance of the provisions of the will of Benjamin Joy for the use and benefit of those having

the life estate, and of those having the remainder as they are entitled under the will. This is depriving no one of his property, but is merely changing real into personal estate for the benefit of all parties in interest. This part of the resolve, therefore, is within the scope of the power exercised from the earliest times, and repeatedly adjudged to be rightfully exercised by the legislature."

The court then refer with approval to the following cases, in which the same doctrine was sanctioned:

Blagge *v.* Mills, 1 Sto. R., 426.

Davison *v.* Johannot, 7 Met., 388.

Clark *v.* Van Surlay, 15 Wend., 436.

Cochran *v.* Van Surlay, 20 Wend., 365.

Bambaugh *v.* Bambaugh, 11 S. & R., 191.

Estep *v.* Hutchinson, 14 S. & R., 435.

In the recent case of Leggett *v.* Hunter, 19 New York, 445, the same doctrine was emphatically sanctioned, and it was there held that the legislature might by public or private acts provide for the sale of vested or contingent interests of infants in *esse* or yet to be born in real estate, or of any other persons under disability.

Now it is perfectly clear that the power to authorize the sale of the lands of a charity is derived from the same source, and rests upon the same principles.

A charity is never, so to speak, *sui juris;* it is under perpetual guardianship, and its guardian is the state. It is for this reason that the trustees are *prima facie* guilty of a breach of trust in selling the estate of a charity without authority derived from the state.

And we submit that it is not in the power of a donor to a charity so to fetter the state as to prevent the sovereign power from authorizing a lawful disposition of the estate given to the charity, its ward, when it is clearly made to appear that it will be for the interest of the charity. This never has been done, and we contend that it can not be done.

We do not mean to assert that the state may divert the fund from the use to which it is given; it is not necessary for us to go so far. What we say is, that the state may authorize

such modal changes in the property from time to time as may be found to be necessary and proper, and that it is not in the power of a donor to provide that this shall not be done.

In the case at bar the fund devised changed only in form, still remains subject to the trusts of the will in perpetuity, and is hedged about by the most careful provisions for its security. We have thus attempted to show that there is nothing in the general principles which may be said to limit legislative authority, and nothing in the Constitution of Connecticut forbidding such a law as the one in question; nor is there any provision in the Constitution of the United States that would seem to have any bearing on the question of the validity of this law. It can not be maintained that it is a law impairing the obligation of any contract, and even if it were, it is impossible for us to perceive how it could avail the plaintiffs. If there is any compact it is that the land shall forever be devoted to pious or charitable uses. Is the heir-at-law asking to have this compact observed and performed? Is he intending to devote the land to those uses? Clearly not; he is seeking to recover the land, not for the use of the society, in order that the supposed compact may be executed, but for his own private use. How then can it be said that there is anything in the compact to which the heir-at-law is a party, or of which he has a right to avail himself, arising between the donor and the State, or between any two parties.

This statute, until the revision of 1821, contained a clause exempting property given to the uses therein mentioned from taxation, and the courts of Connecticut, in some early cases, involving the right of the State to tax such land, speak of the exemption contained in the statute as a compact or pledge on the part of the State that they should be forever exempt from taxation.

These decisions have, however, recently been overruled, and in Brainard *v.* Town of Colchester, 31 Ct., 409, the court say, "There is nothing in the language of the statute which makes it differ from ordinary statutes specifying what should or should not be subject to taxation."

The notion that a general law of the State prescribing what disposition the owner may make of property, or any other general law, is in the nature of a compact between the State and the citizen, is entirely erroneous. If it were so, any law whatever, authorizing a different disposition of property in any respect from that contained in a will, no matter for what cause, would be clearly void, because if there was a compact between the donor and the State that the devisor might make such a disposition of his estate, and that the State would never authorize any change in the provisions of his will, the State could not make a law authorizing any departure from the terms of the will without violating the compact, yet we have shown that this is constantly done.

The statute of wills provides that the owner of real estate may dispose of it by will as he may deem proper, and direct its descent within the limit allowed by the statute against perpetuities; but we presume it never occurred to any one that the Legislature could not, by a general law, deprive the owner of real estate of the right to dispose of it by will, or modify or restrict the right at pleasure, although the estate may have been purchased in the firm belief that the right to dispose of it by will would remain unimpaired; yet this right could not be destroyed or restricted if there is a compact between the State and every citizen of the State by which the faith of the estate is pledged to all who will purchase land that they shall have the right to dispose of it by will in a certain manner.

We submit then that there is no force in the suggestion that this statute creates anything in the nature of a compact between the State and any one. It was simply a general law, confirming certain grants and devises of land already made, and authorizing others of a like character. (31st Ct., 409.)

The power which the Legislature of Connecticut exercised in this case it has exercised unquestioned for two hundred years, and this in itself would be a sufficient vindication of its right to continue to exercise it.

There is an additional consideration growing out of the long continued practice of the Legislature in passing such acts as this, of so much importance as to have been deemed

worthy of special consideration by courts in similar cases. That consideration is the effect which a decision against the validity of this act would have in unsettling other titles to land.

It is not too much to say that there are thousands of titles in the State of Connecticut resting upon the validity of acts of this nature. In Davidson *v.* Johannot, the court say, "the vast amount of property now held under titles derived from similar legislative acts should lead us to proceed most cautiously in the investigation of this subject, and to deal with it in a liberal spirit when called upon judicially to declare that this course of legislation conflicts with the constitution, and that all the special acts of this character are of no validity."

In Norris *v.* Clymer, C. J. Gibson says, "It is not above the mark to say that ten thousand titles depend on legislation of this stamp, for many of those statutes contained provisions for more than twenty distinct estates, and could not the ruin that would be produced by disturbing them be arrested by anything less than a convention to effect a constitutional sanction of them, the consummation would not be dearly bought."

B. R. Curtis
Wm M. Gardiner
Of Counsel

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1866.

EZRA S. STANLEY ET. AL. *vs.* ELIZABETH H. COLT.

Brief of Counsel for Stanley Heirs.

THE questions in this case arise upon the conveyance of the premises in question, by the South Ecclesiastical Society to Samuel Colt, and are three in number, viz.:

I. Had the Society power under the will itself, to sell and convey this property to Samuel Colt without incurring a forfeiture?

II. If it had not such power under the will, was it enabled so to do by the act of the Legislature of 1852?

III. If the Society had no power to convey from either source, what consequence results from its violation of the condition of the devise?

The plaintiffs as heirs of the testator, Nathaniel Stanley, say:

First Point.—The Society under the provisions of the will, could not sell without violating the condition upon which they held the property, and thus incurring a forfeiture of their title.

I. It is apparent from the very fact of their asking the Legislature for power to sell, as well as from the averments of the petition itself, that it then was and always had been the practical construction of the will, that the Society could not sell without losing all interest in the property.

They say, in effect, upon page 13 of the case, that they have "no power to sell and convey in fee simple"—and on the same page in the prayer they ask the Legislature to "*authorize* a sale and conveyance of said property in fee simple."

The Legislature (p. 8 of case,) find these allegations to be true.

This is a *practical construction* of this will, established by an acquiescence for sixty-five years, which should have great weight with a court.

It is only since the sale and the commencement of this suit by the heirs that any such question has arisen.

II. We say, however, that both by the obvious *intent* of the testator and by the legal effect of the words used, this devise is of an estate upon condition subsequent, a breach of which destroys all rights of the Society in the property.

1st. It seems to us unnecessary to make citations from the will, or comments thereon to show that the testator *meant* to deprive the Society of the power to sell.

He intended that this property should *always* remain in the hands of the Society.

His reasons for this are obvious.

He believed that the city of Hartford would increase steadily, as it has done; that the Society would increase with it, and as it increased would need a larger income; that this property would increase in value with the growth of the Society, and supply its increased wants, while if the land was sold and the money invested, the Society would receive no larger amount an hundred years thereafter, than at that day.

Such a provision would ensure the Society a certain income; the land would always remain; whereas all other kinds of investments were liable to loss or depreciation.

It would also ensure that *only* the income should be spent: that the principal should not be expended in buildings which might be destroyed, and would in time become too small or otherwise useless.

The testator also desired that he should be remembered in connection with this Society forever.

Instead of founding a hospital, a library or institute, he gave his property to religious purposes—and as he could not identify his name with the church building, he desired the *land* to be always kept in the possession of the society.

The courts in Connecticut and elsewhere have held, that where land was devised to an ecclesiastical society, the intent of the donor is shown *by that very act* to be that it should not be sold.

In Brainard *v.* Colchester, 31 Conn., 407, in considering such a devise the court say on p. 411, "such a conveyance would in most instances *be in fraud of the donor*. His motive is to make the ecclesiastical society, or the institution which is the object of his bounty perpetual, by providing *for it an annual support*. He wishes that the money which he has accumulated and which he must soon leave, *may be the means of conferring benefits on his survivors through all time*. The donee by making what amounts to an absolute disposition of the property disregards this purpose of the donor. *The identity of the property is annihilated*, and the avails can be squandered or applied to any other object."

So in the Dartmouth College case, 4 Wheat., 518, Marshall C. J., says on p. 647, "It requires no very critical examination of the human mind to enable us to determine that one great inducement to these gifts is the conviction felt by the giver that the disposition he makes of them is *immutable*. It is probable that no man ever was, and that no man ever will be the founder of a college, believing at the time, that the act of incorporation constitutes no security for the institution, believing that it is immediately to be deemed a public institution *whose funds are to be governed and applied not by the will of the donor, but by the will of the Legislature. All* such gifts are made in the pleasing, perhaps delusive, hope that the charity will flow forever *in the channel which the givers have marked out for it*."

Not only is this intent a necessary deduction from the fact of the devise and from the objects in view, but also the means adopted by the testator to accomplish this intent, are the most effectual that could be conceived for that purpose.

He did not wish to entrust the accomplishment of his object to the Society, to the legislature, or even to courts of equity.

He determined to make it the *interest of the society and its members* to use the gift as he directed, by causing a forfeiture to follow their misuse.

2nd. We say further that the testator used apt words to carry out this intention.

In construing wills, courts are governed by certain well settled rules which we find laid down in all the text-books.

In Jarman on Wills, Vol. II. p. 526, (side page 744,) the seventeenth rule is as follows: "Where a testator uses technical words, he is presumed to employ them in their legal sense, unless the context clearly indicates the contrary."

In Redfield on Wills, Vol. I. p. 434, the third rule is, "In seeking for the expressed intention of the testator, his words are to receive that construction and interpretation which a long series of decisions has attached to them, unless it is very certain they were used in a different sense."

The word *provided* is a technical word, its meaning has been settled by innumerable decisions and it has always been held that a devise to A, *provided* he should or should not perform certain acts, is a devise upon a condition subsequent, and the estate vests in A, subject to being divested if he does or does not perform the acts specified.

This is the rule in Connecticut.

In Wright *v.* Tuttle, 4 Day, 313, Swift, J., says on p. 326, "There is *no word more proper* to import or express a condition, than the word *provided, and it shall always be so taken* unless it appear from the context to be the intent of the party that it shall constitute a covenant."

These words were cited and approved in Rich *v.* Atwater, 16 Conn., p. 409, on p. 419.

In Wheeler *v.* Walker, 2 Conn., p. 196, the court say on p. 201,

"Land granted to a person on condition, or *provided always*, or if it shall so happen, or so that, he pay to another a specific sum within a specified time, vests in him a *conditional estate*, and if he does not punctually make payment of the money, *his estate has become voidable* by entry."

This decision is especially important as it has been affirmed by subsequent decisions. Judd *v.* Bushnell, 7 Conn. R.. 205; Loyd *v.* Holly, 8 Conn., 491 and others, and has ever since been considered as fixing the law in the State of Connecticut on this subject, and the case at bar being in relation to the construction of a will devising real estate, this court will govern itself by the decisions of Connecticut on this point.

In Jackson *v.* Chew, 12 Wheaton, p. 153, this court say on p. 167; "This court adopts the state decisions because they settle the law applicable to the case, and the reasons assigned for this course apply as well to rules of construction growing out of the *common law*, as the statute law of the State when applied to the title of lands," and again on p. 168, "whether their rules of land titles grow out of the statutes of a state, or principles of the common law adopted and applied to such titles can make no difference."

The same principle is established in the case of Suydam *v.* Williamson, 24 How., 433.

But this construction of the word *provided* is not confined to Connecticut: it has always been so held both in England and this country from the earliest time.

In Comyns Digest, Vol. 3, p. 74, Condition A 2, it is said: "Divers words *of themselves* make an estate upon condition

as sub conditione, *proviso semper*, and the word *proviso* makes a condition though joined with other words, as provided always and it is covenanted, provided and it is agreed, and therefore if the word *proviso* be the speaking of the grantor and obliges the grantee to any act, it makes a condition in whatever part of the deed it stands, and though there be covenants before and after, it is not material."

This is in relation to deeds, but on p. 76, A 4, he says in relation to wills, " So words make a condition in a will which will not make it in a deed. So a devise to A *provided, and my will is that he keep it in repair*, makes a condition; so there shall be a condition in a will though there be no words that the estate shall cease, as a devise to a wife, *provided that she shall have a rent only if she departs out of London.*"

Similar decisions as to the effect of the word " provided " have been made in most if not all the states.

In Hooper *v.* Cummings, 45 Maine, p. 359, the expression was " provided they (the grantees) fence the land and keep it in repair," the question arose whether this word created a condition, and the court say, p. 365, " we may assume that the *proviso* in the deed created a condition subsequent, and in this we are sustained by most if not all the authorities ancient and modern."

In Chapin *v.* School, 35 N. H., p. 445, the court say on p. 450, " The usual words of a condition subsequent are ' so that ' ' provided,' " &c.

In Wiggin *v.* Berry, 2 Foster (N. H.,) p. 114, a devise was to a town " provided " they would pay the taxes on the land and devote the net profits to keeping a school for the benefit of the inhabitants. The town did not comply with these conditions, and the court held that this was a devise upon condi-

tion, that the town had forfeited their title, and the land went to the testator's devisees. This case seems to be directly in point.

In Attorney General *v.* Merrimack Co., 14 Gray, p. 586, the court say on p. 612, "The words 'provided' 'so that' and 'upon condition that' are the usual words to make a condition.

In Hayden *v.* Stoughton, 5 Pick., p. 528, the devise was to a town for a school-house, "*provided* said school-house is built by said town within one hundred rods of the place where the meeting-house now stands."

The court say on p. 534, "We are all clearly of opinion that it (the devise) was upon a condition subsequent and that the estate vested immediately in virtue of the devise. The fee did not vest in abeyance until the school-house should be built, but was to be forfeited if it should not be built in a reasonable time."

In this case the school-house was not built, and the court held that the land upon entry by the heirs reverted to them. It is an important case in many respects, and will be referred to hereafter.

In Hadley *v.* Hadley, 4 Gray, 140, on p. 145, the court held that the words "provided" and "on condition," had the same effect in making a devise conditional.

In Rawson *v.* School District, 7 Allen, p. 125, the court in speaking of a conditional estate, say on p. 128, "The usual and proper technical words by which such an estate is granted by deed are 'provided, so as, or on condition.'"

In Tattersal *v.* Howell, 2 Merivale, p. 26, the same word "provided" was used and the court held it created an estate upon condition. See also,

Martin *v.* Manton, 47 Maine, 495.
Case *v.* Robertson, 1 Selden, 125.
Pickle *v.* McKissick, 21 Penn. State, p. 232.
McKissick *v.* Pickle, 16 Penn. State, 140.

Similar expressions have been held to create a condition in such cases.

In Princeton *v.* Adams, 10 Cushing, 129, a devise was to a church and society "*so long as* they maintained their present essential doctrines and principles of faith and practice," and it was held to be forfeited by a change from Unitarian to a Trinitarian system of faith.

In Castleton *v.* Langdon, 19 Vt., p. 210, a conveyance was to a town to erect and keep a school-house "and for no other purpose." The court say on p. 217, "That the conveyance must be regarded as subject to a *condition* requiring the lessees to keep and maintain a school-house, &c., is undoubtedly true."

See also Congregational Society *v.* Stark, 34 Vt., 388.

In Scott *v.* Stipe, 12 Indiana, p. 74, a devise of land was "that the said Bethel Church may have a suitable place of worship," held a devise on condition, and that a sale of the land was a breach, for which the heirs of the devisor could enter and recover the land.

It has been held also that a devise or conveyance for a specified public use, was forfeited without any words of condition if it was not applied to the specific use mentioned.

In Daniel *v.* Jacoway, 1 Freeman, Ch. R. p. 59, land was given "for the use and benefit of a county for a county site for a court house," the land was used for other purposes, and it was held to be forfeited.

The usual and legal effect of this word provided, being therefore to create a conditional estate, subject to forfeiture by a breach of the condition, this court will give it such a construction here; following the rule laid down in Gold *v.* Judson, 21 Conn., 616, where the court say, p. 625, "We are *bound* to suppose the testator used language in its usual and legal sense." And again, "evidence of such intent (to use the word in a different sense) must be *clear and decisive*, or we cannot admit it to have such an effect."

There is another rule of construction applicable to this question.

That is that where a word is used in one devise in a will with a particular meaning, and is again found in a subsequent devise used in the same manner, it is to have the same effect.

No. 18 of Jarman's Rules of Construtions.
Jarman on Wills, Vol. 2, p. 527, (side page 744.)

In Ridgeway *vs.* Munkitrick, Dru. & War., p. 84, Lord Chancellor Sugden says: "It is a well settled rule of construction, and one to which from its soundness I shall always strictly adhere, never to put a different construction on the same word where it occurs twice or oftener in the same instrument, unless there appear a clear intention to the contrary."

In the second devise in this will (page 5 of case) the testator devises certain lands to Elizabeth Whitman, "provided she shall not make any claim upon my estate for any services done for me."

There can be no doubt but that this is a devise upon condition subsequent, upon the breach of which a forfeiture would ensue.

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Rogers *v.* Law, 1 Black, 253.
Sackett *v.* Mallory, 1 Met., 355.

It follows therefore from the application of this well settled rule of construction, that when the testator uses this same word, in the same connection in the next clause but one of the will, the same construction should be given to it.

The more so as in the same devise a few lines before, he refers to this land given to Elizabeth Whitman, showing that he must have had that clause in his mind.

We say therefore that both from the manifest intent of the testator, and by force of the words used to express that intent, this is a devise upon a condition that the Society should "not ever hereafter sell or dispose of" said land.

They would then have no power under the will to sell, without thereby causing a forfeiture of their interest in the land, as will be shown more fully under the third point.

It may be claimed, however, that this condition is void, as a restriction of the power of alienation, but the law is not so.

1st. It has always been held in Connecticut by an uninterrupted chain of decisions, that under the act of 1702 (see page 7 of case,) such a restriction is valid.

In New Haven *v.* Sheffield, 30 Conn., 171, decided in 1861, the court say, "The chief object in the enactment of that statute was not so much to exempt certain estates from taxation as to *confirm and perpetuate* the estates referred to in it." And this expression was affirmed and approved in the very

latest case on the subject. Brainard *vs.* Colchester, 31 Conn., p. 407, decided in 1863.

In Hamden *v.* Rice, ~~22~~ 24 Conn., p. 350, a devise was to a town directing "all the interest thereof to be laid out in repairing highways and bridges annually, and not to be expended for any other use." It was objected that this devise was void as creating a perpetuity, but the court say on p. 356, "Upon the most careful examination and reflection we cannot entertain a doubt whether we look at the principle of the cases, or the settled law in England, or the decisions of this country, that the use in question is one of a public and charitable nature *which our statute* (of 1702) *allows to be continued in perpetuity.*

The same doctrine in substance has been held in all the cases relating to the statute of 1702, (more particularly referred to under the second point,) and no decision to the contrary has ever been made in Connecticut.

This court therefore will hold itself bound by the decisions of the State of Connecticut on this subject.

See Perin *v.* Carey, 24 How., 465.

2d. Apart from this statute of 1702 it is conceived that such a devise to an eclesiastical society is good.

In very many of the cases hereinbefore and hereinafter cited, similar devises were held to be valid.

In Brattle Square Church *v.* Grant, 3 Gray, 142, the devise was on condition that the land should *never* be sold, but the minister should always reside on it. In considering the question whether the devise was void as violating the rule against perpetuities, the court say, on p. 148, "A grant of a fee on condition only creates an estate of a base or determinable

nature in the grantee, leaving the right or possibility of reverter vested in the grantor. Such an interest or right in the grantor, as it does not arise and take effect upon a future uncertain or remote contingency, *is not liable to the objection of violating the rule against perpetuities*, in the same degree with other conditional and contingent interests in real estate of an executory character. *The possibility of reverter, being a vested interest in real property* is capable at all times of being released to the person holding the estate on condition or his grantee, and if so released vests an absolute and indefeasible title thereto. *The grant or devise of a fee on condition does not therefore fetter and tie up estates so as to prevent their alienation, and thus contravene the policy of the law which aims to secure the free and unembarrassed disposition of real property.*"

The case of Austin *v.* Cambridgeport, 21 Pick., 215, was a grant of land to a parish on condition that it be forever used as a site for a church in part, and in part for the support of the minister.

In commenting on this case in Brattle Square Church *v.* Grant, the court say on p. 160, "That was a grant by deed of an estate, defeasible on a condition subsequent which was legal and valid. The possibility of a reverter was in the grantor, and his heirs or devisees, the residue of the estate was vested in his grantee, the parish, the two interests united made up the entire fee simple estate, and were vested in persons ascertainable, and capable of conveying the entire estate. *There was nothing, therefore, in that case which resembled a perpetuity, or restrained the alienation of real property.* The conditional estate in the parish and the possibility of reverter were vested estates and estates capable of conveyance and constituted together an entire title or estate in fee simple."

3d. But this point has been directly decided, both in this court and in many of the States.

In Perin *v.* Carey, 24 Howard, 465, an important case, very fully argued, one claim was that the devise to a charity providing that none of the land should ever be sold, was void as making a perpetuity contrary to law, but the court unanimously held on p. 495, that a devise to a charity could be made in perpetuity, and on p. 507 say, "The direction in the will that the real estate should not be alienated, makes no perpetuity in the sense forbidden by the law, but only a perpetuity allowed by law and equity in the case of charitable trusts."

In Williams *v.* Williams, 4 Selden, 525, an important case and elaborately argued by both counsel and court,—a devise was made similar to that in the case at bar and the court held it valid. They say on p. 535, "The object of this class of corporations, (an ecclesiastical society) then, being to perpetuate the uses of the property acquired by them, it necessarily follows that it is legal for a donor to prescribe by way of limitation *or condition*, that his particular gift shall be kept and preserved so as to subserve the purposes which the corporation was created to promote, and that it shall not be wasted, *alienated*, or otherwise misappropriated." And on p. 554, "Charitable gifts from their nature are exempted from the law respecting perpetuities," and again on p. 555, "It is perfectly certain that the law of charitable uses in England, was never understood to be subject to the law against perpetuities, but on the contrary it formed a well settled exception to the operation of that law."

In Franklin *v.* Armfield, 2 Sneed, 305, in a similar case, the court say, "At common law charitable uses are exempted from the rules against perpetuities," and they cite to this point, Lewis on Perpetuities, p. 663, et seq.

In State *v.* Gerard, 2 Iredell Eq. (N. C.,) p. 210, a devise to a charity was on condition that the land should never be

sold, but be let for not more than seven years at a time, and the court held on the same grounds as in the cases above cited, that the devise and condition were both valid.

See also Griffin *v.* Graham, 1 Hawk., (N. C.,) p. 96.

In Curling *v.* Curling, 8 Dana, 38, a devise for a charitable purpose, with a direction that the land should never be sold, but be rented out and the rents and profits applied to the charity, was held valid as not coming under the rule as to perpetuities.

See Wiggin *v.* Berry, 2 Foster, 114.
Brown *v.* Hummell, 6 Penn. State, 86.
Grissom *v.* Hill, 17 Ark., 483.

SECOND POINT. It appearing then that the society had no power under the will to convey without incurring a forfeiture of the property, they applied for and obtained a special act of the legislature of Connecticut at the session of 1852, (case p. 7,) purporting to give them authority to sell without incurring such forfeiture.

Conn. Stat. Rev. of 1849. p. 413-414.

We say this act was void upon three grounds.

1st. The legislature either of the State of Connecticut, or of any other State has no power to alter the express conditions of a will.

Such an attempt is contrary to the principles of natural right and justice which no legislature can contravene.

It has always been held in the State of Connecticut that such laws are void.

The present constitution of the State, was adopted in 1818.

In 1822, in the case of Goshen *v.* Stonington, 4 Conn., p. 209, the court say on p. 225, "With those judges who assert the omnipotence of the legislature in all cases where the constitution has not interposed an explicit restraint, I can not agree. Should there exist, what I know is not only an incredible supposition but a most remote probability, a case of the direct infraction of vested rights too palpable to be questioned, and too unjust to admit of vindication, I could not avoid considering it as a violation of the social compact, and within the control of the judiciary."

In Starr *v.* Pease, 8 Conn., p. 541, decided in 1831, and which has generally been considered as holding that the legislature of the State of Connecticut had unlimited power except where the Constitution of the State and of the United States restrained it, the court say, p. 548, "If (the constitution of

1818,) found the State Sovereign and independent, with a legislative power capable of making all laws necessary for the good of the people not forbidden by the Constitution of the United States, *nor opposed to the sound maxims of legislation*, and it left them in the *same condition*, except so far as limitations were provided."

In Hooker *v.* Canal Co., 14 Conn., 146, the court say on p. 152, "The fundamental maxims of a free government require that the right of personal liberty and private property should be held sacred," and cite Wilkinson *v.* Leland, 2 Peters, 657, hereinafter referred to.

They further cite and approve the expressions of Marshall, C. J., in Fletcher *v.* Peck, 5 Cranch, 185, "And it may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power, &c."

See also Beach *v.* Walker, 6 Conn., 190, (198.)

In Gas Co. *v.* Gas Co., 25 Conn., p. 19, the court say that an act is void as creating a monopoly, and on p. 38, say, "Although we have no direct constitutional provision against a monopoly, yet the whole theory of a free government is opposed to such grant.

In Hotchkiss *v.* Porter, 30 Conn., p. 414, the court say on p. 418, "Every person who is entitled to the protection of our laws is entitled to protection against injuries to his reputation and to redress for them when committed. This is a *great natural right* resting upon the *fundamental principles which underlie the social compact*, and existing independent of constitutional provisions."

This whole subject is very fully treated in the very late decision of Booth *v.* Waterbury, 32 Conn., p. 118, where it is expressly held that the legislature can pass no laws contrary to the "principles of natural justice."

All these cases, and the jurisprudence of Connecticut on this subject, are in harmony with and in fact founded upon

the case of Calder *v.* Bull, 3 Dallas, p. 386, a case which went from Connecticut to this court, and the expressions in Goshen *v.* Stonington, are almost precisely identical with those of Mr. Justice Chase, where he says, "I can not subscribe to the omnipotence of a State Legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the state."

It being therefore held in Connecticut that the courts of that State may hold a law void, because it is contrary to the natural and fundamental principles of justice, this court will follow the same rule.

But both in this court and in many of the State courts the same rule is applied.

Terret *v.* Taylor, 9 Cranch, 43.
Calder *v.* Bull, 3 Dallas, 386.
Wilkinson *v.* Leland, 2 Peters, 627.
Billings *v.* Hall, 7 California, p. 1.
Regent *v.* University, 9 Gill. & John., p. 365.
Benson *v.* Mayor, &c., 10 Barb., 223.
Hatch *v.* Vermont R. R., 25 Vermont, 49.
Railroad Co. *v.* Davis, 2 Dev. & Bat., 451.
Brown *v.* Hummel, 6 Penn. St., 86.
Irvine's Appeal, 16 Penn. St., 256.

It would seem unnecessary to argue long to prove that an interference by a Legislature with the express provisions of a will, substantially revoking a provision which it was the especial object of the testator to make, and defeating his clear intent, is contrary to the principles of natural justice.

Such cases have very seldom occurred.

Perhaps the only similar ones to be found are some cases in Pennsylvania, in all of which the act was held void.

In Brown *v.* Hummel, 6 Penn. State Rep., p. 86, a devise of land was made to an Orphan Asylum with a provision that the lands be never sold, but the rents and profits only be applied to the use of the asylum. The Legislature by a special act directed that part of the land be sold.

The court, then presided over by Chief Justice Gibson, held unanimously that the act was void and unconstitutional, as altering the express provisions of a will, and as taking property without compensation and contrary to the law of the land, that is without any notice or hearing, and on p. 94 they expressly lay down the law that a Legislature cannot authorize what a will expressly directs shall not be done.

See also Ervine's Appeal, 16 Penn. State Rep., p. 256.

Shoenberger *v.* School District 32 Penn. St. Rep., p. 34

If the Legislature can by a special act dispense with the performance of one condition of a devise, they can with any.

In this case we think the act is void also from conflict with both State and National Constitutions, but if it were not, we confidently submit to this court that no Legislature can by a special act change the provisions of a will; certainly not in Connecticut.

Such an act as this is entirely different from those enabling or healing acts often passed, such as those authorizing a

sale of minor's lands, or those of lunatics, &c. In all such cases they merely remove a *personal disability*.

Powers *v.* Bergen, 2 Selden, 358.
Shoenberger *v.* School District, 32 Penn., 34.
Legget *v.* Hunter, 5 E. D. Smith, p. 445.

It may be claimed that a Legislature has power as *parens patriæ* to interfere and authorize a sale of land in cases like the one at bar; but the authorities say that the Legislatures in this country have no such power.

In Moore *v.* Moore, 4 Dana (Ky.), p. 354, the court say on p. 366, "We do not admit that the Commonwealth as *parens patriæ* can rightfully interfere, unless there has been an escheat to her, and then she can become absolute and beneficial owner. Rights here are regulated by law, and if any person has a claim to property ineffectually dedicated to charity, the Commonwealth has no prerogative right to decide on that claim and dispose of the property, as the King of England has been permitted to do.

Lepage *v.* McNamara, 5 Clarke (Iowa), p. 124.

2d. We say further, this act of 1853 is void, as depriving the plaintiffs of property, contrary to the Constitution of the State of Connecticut.

In Article 1, Section 9, of that instrument, it is declared that no person shall "be deprived of life, liberty or property,

but by due course of law," and Section 11 declares "The property of no person shall be taken for public use without just compensation therefor."

It has always been held in Connecticut that under these sections the Legislature could not impair rights of property, except for public use and with compensation.

In Hanchett *v.* King, 4 Day, p. 360, the case was similar to the one at bar, and the court in speaking of the power of the Legislature, say on p. 367, "Now if the first society had the power to alienate in this manner, the interference of the legislature was unnecessary. If no such power exists, a doubt may well arise whether it could be conferred even by the Legislature. *For if an alienation contrary to law works a forfeiture, and the estate revests, can an act of the Legislature prevent the forfeiture and thus defeat the right of reversion.*"

Northland Dayton Merrill 3 Conn
Trust v Worthington 6 Conn 223, 1826

In Berlin *v.* New Britain, 9 Conn., p. 157, the court say on page 131, "The rights and property of an individual or a corporation, the Legislature had no authority to annul or impair. This proposition is self evident, at least to every mind that does not admit the Legislative authority over the property of every individual and every corporation to be absolutely and unqualifiedly supreme."

In Beardsley *v.* Smith, 16 Conn., p. 368, the court say on p. 375, "The plaintiff urges the unconstitutionality of that resolve upon the ground that it authorizes the taking of private property for public use without compensation; or the seizure of the property of one person for the benefit of another without his consent. And it must be conceded that if such be the purpose or effect of the resolve in question it is unconstitutional and void."

In Woodruff *v.* Neal, 28 Conn., p. 165, the court say on p. 169, "It constitutes the taking of the property of one person for the use either of another, or of the public. *If of the former, it cannot be done either with or without compensation;* if of the latter it may be done, but only on providing compensation. These principles are now well settled."

The construction put upon a clause in a State Constitution by the courts of a State will be followed by this court.

Webster *v.* Cooper, 14 How., 488.

These clauses exist in the Constitution of almost every State, and a similar construction has always been given to them.

In a case entitled In re Albany Street 11 Wendell, p. 149, Savage, C. J. says on p. 151, "The Constitution by authorizing the appropriation of private property to public use impliedly declares that for any other use private property shall not be taken from one and applied to the private use of another."

See Powers *v.* Bergen, 2 Selden, 358.
Regents *v.* University, 9 Gill. & J., 365.
Brown *v.* Hummel, 6 Penn. St., 86.
Irvine's Appeal, 16 Penn. St., 256.
Proprietors, &c. *v.* Laboree, 2 Greenleaf, 275.

Webster v Cooper 14 How 488
Fowler v Hospital 3 Cush 483
Shoenberger v School 32 Penn 34

It is not pretended that in this case any compensation was made, nor were any of the plaintiffs cited to appear, or notified in any way of the proceedings.

The sole question, therefore, is whether by this Act, any property or right to property of the plaintiffs was taken from them.

We say that the heirs of the testator had a *conditional* or contingent interest, being a right to enter upon and hold this property for a breach of condition, which right this act, if valid, would deprive them of.

The case of Hayden *v.* Stoughton, 5 Pick., 528, is directly in point. In that case there was a devise to a town upon condition that they erected a school-house, which they neglected to do, and the land was thereby forfeited. An action to recover it was brought by the heirs of the residuary devisee, and the Court held that there was a *contingent interest* left in the devisor, which by the residuary devise he gave to the residuary devisee.

On page 539 the Court say, "There was a *contingent interest* which the devisor might have disposed of if he had pleased, to take effect upon the forfeiture of the estate, and he has in the residuary clause used words which are broad enough to pass the contingent interest. *It is clear that the testator did not dispose of his whole interest to the inhabitants.*"

And again on p. 540, "The testator had an interest undisposed of, depending upon the contingency of the performance or non-performance of the condition."

This case was affirmed in Austin *v.* Cambridgeport, 21 Pick., 215.

In Proprietors, &c., *v.* Grant, 3 Gray, 144, the principle is laid down as follows, on p. 147: "Where an estate in fee is created on condition, the *entire interest* does not pass out of the grantor by the same instrument or conveyance. All that remains after the gift or grant takes effect continues in the grantor *and goes to his heirs*. This is the right of entry as we have already seen, which from the nature of the grant is reserved to the grantor and his heirs only, and which gives them the right to enter as of their old estate upon the breach of the condition. This possibility of reverter, as it is termed, arises in the grantor or devisor immediately on the creation of the condition."

In Robertson *v.* Fleming, 4 Jones, Eq. p. 387, the Court say, "It is well settled that not only a vested interest, but a contingent remainder, or contingent executory bequest, or a future contingent trust where the person is certain, is transmissible by descent in case of realty."

See also Underhill *v.* R. R. Co., 20 Barb., 455, where the subject is fully discussed and many authorities are collected and approved.

All these decisions are precisely in accordance with the law in Connecticut on this subject.

In Smith *v.* Pendell, 19 Conn., p. 107, the Court say on p. 112, "The right of H., therefore, was more than a naked possibility like that of an heir apparent, *it was an interest in the estate*, though a contingent one. Such an interest is descendible."

These heirs, therefore, had an *interest* in this real estate.

It was a right to re-enter and have the estate upon breach of the condition.

This was as much *property* as the right of a mortgagee to foreclose, or a mortgagor to redeem.

The Act of the Legislature, if valid, deprived them of this right.

It was substantially saying to the Society, you may convey and the heirs shall not enter, and to the heirs, you shall not enter for breach of condition.

It will hardly be denied that if I convey land to A. upon condition that he pay me a sum of money within six months, that before, as well as after the expiration of the six months, I have an *interest* in that land, which is *property* within the fair meaning of this clause of the constitution, and that an Act of the Legislature depriving me of that interest would be void.

But we submit that precisely the same rule must be applied to the conditional devise now in question.

Therefore we say that under the *State* Constitution this Act is void.

3d. We say further that this Act is void as being contrary to that clause of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

It has been held from an early day in Connecticut that by the law of 1702, (printed upon page 7 of the case,) the State made a contract with all devisors of lands for the purposes mentioned in that Act, and that all Acts of the Legislature affecting such devises in any way contrary to such Act are void.

This question first arose in 1826, in the case of Atwater *v.* Woodbridge, 6 Conn., 223.

The last clause of the Act of 1702 exempts the property named in the Act from taxation, and the question was whether an Act of the Legislature taxing such property was valid. The Court say on page 230, "The government (by this Act) made a *contract* with all such persons as might be disposed to give their property to these religious purposes and charitable uses, that it should be forever exempted from taxation."

The question again arose in 1829 in the case of Osborne *v.* Humphrey, 7 Conn., p. 335, and was again argued at great length by some of the ablest counsel in the State, and the Court held in a very well considered opinion, that an Act affecting this exemption from taxation was contrary to this clause of the Constitution of the United States, and based their opinion upon the case of New Jersey *v.* Wilson, 7 Cranch, 164, and quote and affirm the words above cited from Atwater *v.* Woodbridge.

These cases have been repeatedly affirmed by decisions in Connecticut down to the present time.

Parker *v.* Redfield, 10 Conn., 490.
Landon *v.* Litchfield, 11 Conn., 251.
Hart *v.* Cornwall, 14 Conn., 228.
Seymour *v.* Hartford, 21 Conn., 481.
New Haven *v.* Sheffield, 30 Conn., 160.
Brainard *v.* Colchester, 31 Conn., 407.

If the question whether the act of 1702 was a contract with devisors to pious uses is to be decided by the courts of the State of Connecticut there can be no doubt about it.

It may be claimed under the opinions of some of the Judges of this court in State Bank of Ohio *v.* Knoop, and Ohio Trust Co., *v.* DeBolt, in 16th Howard, that the question as to whether an act of a State Legislature created a contract is for this court to decide, and the cases of Jefferson Bank *v.* Skelly, 1 Black., 436, and Bridge Proprietors *v.* Hoboken Co. 1 Wallace, p. 116, say that this court is not bound by the decisions of the State courts on this point.

But no case has held that when the State courts decide that there was a contract, this court will say that there was *not*.

But even if this be so, the decisions of this court equally establish the proposition, especially the case of Dartmouth College *v.* Woodward, 4 Wheat., 518.

Upon p. 642, Marshall C. J., says, "These gifts were made not indeed to make a profit for the donors or their posterity, but for something in their opinion of inestimable value, for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object *in the mode prescribed by themselves.*"

Again in opinion of Story J., on p. 689, it is said, "The crown then, upon the face of the charter, pledged its faith that the donations of private benefactors should be *perpetually devoted to their original purposes without any interference on its own part.*"

"As soon then as a donation was made to the corporation there was *an implied contract springing up* and founded on a valuable consideration, that the crown would not revoke or alter the charter or change its administration without the consent of the corporation."

If therefore the Legislature by organizing a charitable corporation makes a contract with all donors to it, that their gifts shall always be applied to the object specified "in the mode prescribed by themselves," how much more is such a contract made, when the Legislature expressly say, as in the act of 1702, that such gifts "shall forever remain and be continued to the use or uses to which such lands &c., have been or shall be given, *according to the true intent and meaning of the grantors.*"

Under the principles laid down in every case decided by this court as to acts of the Legislature being contracts, this act would be held to make one.

In Woodruff *v.* Trapnal, 10 Howard, p. 191, it was held that a clause in the charter of a bank belonging to the state providing that its notes should be received in payment of debts due to the State was a contract between the State and every holder of such notes.

All the tax cases, from New Jersey *v.* Wilson, 7 Cranch, 165, down to the present time are in precise accordance with the decisions in Connecticut already cited.

State Bank of Ohio *v.* Knoop, 16 How., 369.
Trust Co. *v.* DeBolt, 16 How., 416.
Gordon *v.* Appeal Tax Court, 3 How., 133.
Dodge *v.* Woolsey, 18 How., 330.

See also Terrett *v.* Taylor, 9 Cranch., 43.
Fletcher *v.* Peck, 6 Cranch., 87.
Green *v.* Biddle, 8 Wheaton, 1.

It is evident that the act of 1852 impaired the obligation of, and in fact *destroyed* this contract.

The contract was that the land when so given, should forever remain and be continued to the use or uses to which such lands &c., have been or shall be given and granted *according to the true intent and meaning of the grantors.*

This was the *principal object* in view in passing the act.

In New Haven *v.* Sheffield, 30 Conn. p. 160 the court says on p. 171 "The chief object in the enactment of that statute was not so much to exempt certain estates from taxation as *to confirm and perpetuate* the estates referred to in it with certain attending privileges."

These words were cited and approved by the court in Brainard *v.* Colchester, 31 Conn., p. 407, the last case on this subject in Connecticut.

Now the "true intent and meaning" of the testator was as expressed in his will, that the land "should not ever thereafter be sold or disposed of," and if so sold it should revert to his heirs.

The Legislature by the act of 1852, said that although this was his intent, so that the society had no power to sell, yet that in spite of his wishes the society *should* have the power to sell, without incurring such forfeiture.

Can any violation of the obligation of a contract more thorough and complete than this be imagined.

In the Dartmouth College case it was held that any substitution of the will of the State for the will of the donors impaired the obligation of the contract.

On p. 652, Marshall, C. J., says "The will of the state is substituted for the will of the donors in every essential operation of the college. This is not an immaterial change. The founder of the college contracted not merely for the perpetual application of the funds which they gave to the objects for which these funds were given, they contracted also to secure that operation by the constitution of the corporation." "This change may be for the advantage of this college in particular, and may be for the advantage of literature in general, *but it is not according to the will of the donors* and is subversive of that contract on the faith of which their property is taken."

But it is claimed that this devise does not come within the provisions of the act of 1702, because it is not for such purposes as are mentioned therein.

The objects specified are "*for the maintenance of the ministry of the gospel* in any part of this colony, or schools of learning, or for the relief of poor people, *or for any other public and charitable use*."

We say first that this is a devise for the "maintenance of the ministry of the gospel."

It is a devise to an Ecclesiastical Society, found by the court to have been established "for the support of the gospel ministry and the maintenance of public worship," page 4 of case.

The lands are always to be kept by the Society, and the rents are to be applied in the first place to purchase a tankard for sacramental purposes; in the next place, to assist in purchasing a bell to summon the congregation to religious exercises, and the remainder of the annual rents and profits were to be applied during all time to the "use and benefit of said society."

Now as the sole object for which said society was established was the support of the gospel ministry and the maintenance of public worship, and the rents were to be applied by the society for its *use* and benefit, they must necessarily be applied for the maintenance of the gospel, as the Society *could not* apply them to any other use.

But this expression of the statute has received a construction by the courts of Connecticut, and words much less apt than those in the will have been held to come within its fair meaning and intendment.

The question first arose in Parker *v.* Redfield, 10 Conn., p. 490. The words then used were "for the support and main-

tenance of the *Church*." It was objected that this expression did not bring the case within the statute, but the court decided that it did.

In Landon *v.* Litchfield, 11 Conn., p. 251, the question again arose and was fully examined by the court. The expression in that case was "one lot with the divisions and commons to be and remain forever *to and for the use and improvement of the first minister and his successors in the work of the ministry in said place*."

The court say on p. 257, "Was that lot granted for the maintenance of the ministry of the gospel, and was such the intention of the grantors? This is the enquiry," and again on p. 258, "But one of two constructions can be put upon this language. The grantors either intended that the benefits of this grant should be personal to the minister, and as has been contended at the bar that the lot conveyed should constitute a sort of glebe for the personal accommodation of the clergyman for the time being; or they intended the grant to enure to the benefit of the inhabitants of the plantation by enabling them the more easily to sustain the preaching of the gospel. *We suppose that the benefit of the grant was intended for those upon whom the support of the ministry would devolve;* and that such is the fair import of the language employed. Had the grant been for the *maintenance* of the ministry, or of the first minister and his successors, there could have been no doubt. And is not the language of the grant equivalent to that? Can it be for a moment supposed to have been the intention of the grantors that the minister for the time being should be in the personal occupancy of this lot? That he should strictly use and improve it, and that his failure to do so should induce a forfeiture of the grant? It has been truly said "that there is no magic in words," and it will be readily admitted that *no particular form of expression* is necessary to bring a case within the provisions of the act of 1702, provided the intention of the grantor can be clearly ascertained. In Parker *v.* Redfield, 10 Conn. R.,

495, the grant was "for the support and maintenance of the church." It was held that this grant was within the act. *And to hold that the grant in question is not within it, would, it seems to us, be doing violence to the intention as well as to the language of the grantors.*"

It seems to us that this last sentence is peculiarly applicable to the case at bar.

And certainly if a devise "for the use and improvement of the minister" is within the act, because the effect would be to "benefit those upon whom the support of the ministry would devolve," a direct devise to the "use and benefit of the society" whose sole duty is to support the ministry, is much more clearly within the statute.

There are decisions in other States in similar cases which sustain this construction.

In a case entitled In re Trustees, 31 N. Y. Rep., (3 Tiffany,) p. 574, the case was a devise to trustees to support scholars of a school, and it was held to be a devise to the school within the meaning of the act of 1806, which speaks of property devised for the use or benefit of a school, citing Att'y General *v.* Tancred, Ambler p. 351, where it was held that a devise to a trustee for sundry students of Christ College was valid under the mortmain acts as in effect a devise to the college.

In McDonough Executors *v.* Murdock, 15 How., 367, the court say on p. 413, "All the property of a corporation like Baltimore is held for *public* uses, and when the capacity is conferred or acknowledged to it to hold property, *its destination to a public use is necessarily implied.*

In Brown *v.* Porter, 10 Mass., 93, it was held that a devise to " the ministry " was equivalent to a devise " to the minister of a parish."

In McGirr *v.* Aaron, 1 Penn., 49, it was held that a devise to a Roman Catholic priest was really a devise to the congregation, because it was really for the use and benefit of the latter.

It has been claimed that the decision in Seymour *v.* Hartford, 21 Conn., p. 481, is opposed to this view, and that it was decided in that case that a devise must follow the exact words of the statute to come under it, but an examination of that decision will show that it is not inconsistent with our claims upon this point, nor with the earlier decisions just cited.

In that case the conveyance of the land was made to the Society in fee, and expressly stated to be " *without any manner of condition.*" It was claimed that *the mere conveyance to an Ecclesiastical Society*, brought the land within the Act so that it could not be taxed.

The Court first say that they affirm all the preceding cases, and the principles upon which they are founded.

They then say, that this being a question of *exemption from taxation*, they shall construe the conveyance *strictly* and so as not to extend such exemptions. And they find a distinction between this and the former cases, in that, them " the

donor had by the *express terms* of the grant *impressed* upon the property a *perpetual sequestration* for the maintenance of the ministry, &c."

They say—"Nothing of this is to be found in the deed of Mrs. Burnham, but on the other hand the deed expressly declares the gift is a sure and absolute fee simple, *without any manner of condition. Of course the grantor does not require that* the property should be sequestered, or kept, or used for the maintenance of the ministry, nor does she declare any particular intent whatever, unless the general character and corporate powers of the society imply one, which we think is not the case."

"We are unable to distinguish this grant from any absolute purchase made by the society generally, or from any *unqualified* gift made to it." "We discover in Mrs. Burnham's deed nothing but an *unqualified* transfer of property, which may be used at the pleasure of the grantees, *no restriction, no sequestration*, for any public object. The society may do with it as they please; *they may sell it, or use it, or give it away, without being liable to any one.*"

We say therefore, that the case at bar differs entirely from the case of Seymour *v.* Hartford in the very points mentioned by the court as the ones in which that case differed from those theretofore decided.

This property *was* sequestered and restricted. If the donor had *any* intent, it was that this land should be *perpetually* sequestrated for the use of the society.

If Mr. Stanley had merely devised this property *to the Society*, saying no more, the case of Seymour *v.* Hartford might be claimed to apply, especially if he had said that he devised it "without any manner of condition," instead of annexing this express condition to it, and repeating it over and over again.

Even if this decision was in point, being made by a divided court, and contrary to the earlier decisions, it would not be considered as binding this court.

Ohio Trust Co. *v.* Debolt, 16 How., 416.
Pease *v.* Peck, 18 How., 595.
Gelpcke *v.* Dubuque, 1 Wallace, 175.
Havemeyer *v.* Iowa County, 3 Wallace, 294.

But if this devise does not come under the expression "for the maintenance of the ministry of the gospel," it certainly does under that of "other public and charitable use."

In Hamden *v.* Rice, 24 Conn., 350, a devise was to a town, the income to be expended for "repairing highways and bridges." It was held to be a devise for a public and charitable use, under the statute of 1702, and that all the objects mentioned in the statute of Elizabeth, including *preachers*, *churches*, &c. were within the meaning of the Statute of Connecticut. The court say on p. 355, "The object of the devise is to confer a public benefit, something beneficial and necessary to all persons indiscriminately, *quite as much as gifts to institutions for learning or religion*, or to the poor and helpless."

See Story's Equity, vol. 2, chap. 32, §1138, et seq.

It follows, therefore, that the case at bar comes under both the words and spirit of the Act of 1702, and that by that Act a contract was made between the State and this donor, that

if he would give property to such uses, it should, so far as the Legislature was concerned, forever remain as he directed.

The Act of 1852 is a direct violation of this agreement, and therefore void.

For all these reasons, we say, the Act of 1852 gave no power to the Society to convey this land without violating the condition of the devise, and thereby causing the legal effect of the breach of a condition.

THIRD POINT. The last question that arises, therefore, is: This devise being upon condition that the Society should not sell and convey this land, and they having broken the condition, what is the effect of such violation?

We say that upon the breach of a conditional devise the heirs of the devisor may enter, declare the devise forfeited by the breach, and recover the property devised.

This is too familiar a rule of law to need to be proved by citations, but we will give a few.

In Hayden *v.* Stoughton, 5 Pick., p. 528, already cited, land was given for a school-house provided it was built in a certain spot. It was not so built, and the residuary devisee entered for breach, and brought this action to recover the land.

The Court held the devise conditional, and found that there had been a breach, and thereby the estate of the loan was forfeited and went to the claimants.

The case of Hayden *v.* Stoughton was affirmed in Brigham *v.* Shattuck, 10 Pick., 306, and again in Austin *v.* Cambridgeport, 21 Pick., p. 213.

Phillips *v.* Medbury, 7 Conn., 568.
Rogers *v.* Law, 1 Black., 253.
Sackett *v.* Mallory, 1 Met., 355.
Wiggin *v.* Berry, 2 Foster, 114.
Princeton *v.* Adams, 10 Cushing, 129.

The same point arose and was decided in almost all of the cases cited under the first point.

It may be claimed that even if the Society have broken the condition of the devise, the land is not thereby forfeited, but that a Court of Chancery, either under the principle of *cy pres*, or its authority over trusts, is the only power that can interfere with the sale.

But in Connecticut the Courts of Chancery have not adopted and do not apply the principle of *cy pres*.

White *v.* Fisk, 22 Conn., p. 31, (54.)

This Court will follow the rule in Connecticut.

Fontaine *v.* Ravenel, 17 How., 369, (p. 384.)

Nor would the principle of *cy pres*, or its jurisdiction over trusts, ever empower a Court of Chancery to authorize or relieve against a breach of the condition of a devise.

Dolan *v.* Baltimore, 4 Gill., p. 394.
Gilman *v.* Hamilton, 16 Ill., p. 225.
De Themmes *v.* De Bonneval, 5 Russell, p. 289.

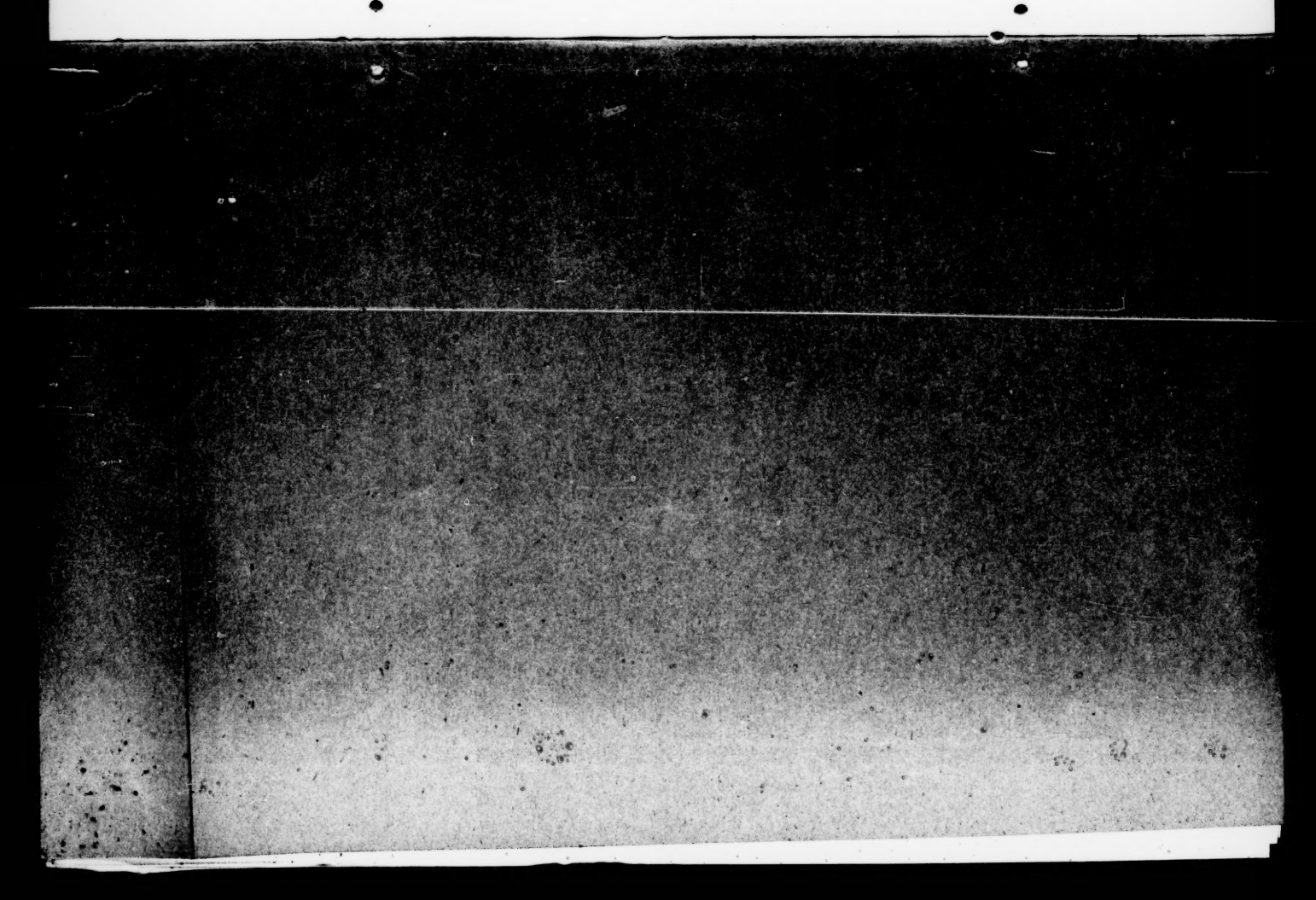
FOURTH POINT.

It appearing then, that the devise in question was conditional; that the Society have violated that condition; that the plaintiffs have entered for breach thereof, and brought this action for the land; the Court below erred in its instructions to the jury; the judgment is erroneous, and should be reversed.

WM. M. EVARTS,

CHAS. E. PERKINS,

Of Counsel for Stanley Heirs.



1 UNITED STATES OF AMERICA:

The circuit court of the United States for the seventh circuit and eastern district of Michigan.

At a circuit court of the United States begun and held at the city of Detroit for the eastern district of Michigan, on Wednesday, the fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty-four, and in the eighty-eighth year of American independence.

Present: The Honorable Noah H. Swayne, circuit judge, and Honorable Ross Wilkins, district judge.

THE UNITED STATES OF AMERICA,
vs.
JAMES S. P. HATHAWAY AND RUFUS C. HATHAWAY.

This is an action of debt set forth in the plaintiffs' declaration filed in the cause, as follows:

The United States of America, plaintiffs in this suit, by Alfred Russell, district attorney, complain of James S. P. Hathaway and Rufus C. Hathaway, heretofore duly summoned, &c., of a plea that they render to the said plaintiffs the sum of one hundred and twenty-six dollars and twenty cents, lawful money, &c., which they owe and unjustly detain from them. For that whereas, by virtue of an act of Congress, approved July 14th, 1862, entitled "An act increasing temporarily the duties on imports, and for other purposes," it is provided that from and after the first day of August,
2 A. D. 1862, in addition to the duties theretofore imposed by law on the articles therein mentioned, and on such as might at the date of said act be exempt from duty, there should be levied, collected, and paid upon staves for pipes, hogsheads, or other casks, and upon other goods, wares, and merchandise ennumerated in said act, imported from foreign countries, a duty of ten per centum ad valorem, now the said plaintiffs in fact say that heretofore, to wit, on the 4th day of November, A. D. 1863, at New Baltimore, in said district, the said defendants imported and brought into the United States, from a foreign country, to wit, from the province of Canada, thirty-six thousand staves for pipes, hogsheads, and other casks, of the value of twelve hundred and sixty-two dollars, without paying thereon the duty of ten per centum ad valorem, to wit, the sum of one hundred and twenty-six dollars and twenty cents, contrary to the form of the said statute, by means of which premises and by force of the statute aforesaid an action hath accrued to the said plaintiffs to have and demand of and from the said defendants the said sum of money above demanded; for that whereas also the said defendants, heretofore, to wit, on the 4th day of November, A. D. 1863, at New Baltimore, in said district, imported and brought into the United States from a foreign country, to wit, from the province of Canada, thirty-six thousand staves for pipes, hogsheads, and other casks, of the value of twelve hundred and sixty-two dollars, without paying thereon the duty of ten per centum ad valorem, to wit, the sum of one hundred and twenty-six dollars and twenty cents, contrary to the act of Congress approved July 14th, 1862, entitled "An act increasing temporarily the
3 duties on imports, and for other purposes," by means of which premises, and by force of the statute aforesaid, an action hath accrued to the said plaintiffs to demand and have of and from said defendants the said sum above demanded. Yet the said defendants, though often requested so to do, have not as yet paid the said sum of one hundred and twenty-six dollars and twenty cents, or any part thereof, to the said plaintiffs, but they to do

this have hitherto wholly refused, and still do refuse, to the damage of the said plaintiffs of one hundred dollars, and therefore they bring suit, &c. To which said declaration the defendants pleaded the general issue, with a stipulation and agreement also made by the parties, that any matter of defence might be shown in evidence on the trial of said cause that would be proper under a special plea, or notice for that purpose.

This cause came on to be tried at this term, before the court and a jury duly empanelled and sworn, whereupon the following facts were admitted and proven by the respective parties and before the said court and jury:

On the part of the said defendants it was admitted that at the time and place alleged in the said plaintiffs' declaration, the said defendants imported from the province of Canada West a quantity of white oak timber, split in the form of pipe and hogshead staves (and so called and known in common parlance) at the place of importation; that said staves were wholly the growth and product of said province of Canada West, and in said province were known and called, in common parlance, rough-split pipe and
4 hogshead staves; that said staves at the time of importation were liable to duty; the amount of said duty would be the sum of ninety-four dollars.

Upon this, the foregoing admissions being made, the plaintiffs rested their case.

It was admitted and agreed by the parties in the defence of said action, and submitted to the said court and jury, for and in behalf of the said defendants, in their defence, that the form and size of the rough-split pipe and hogshead staves is the most convenient form in which the oak and other straight-grained hardwood timber of the two countries (the Canadas and the United States) can be worked and fitted for removal from the forests, and transportation by the common laborer, and that to produce the rough-split staves only requires the most common labor, and does not require the skill of the mechanic; that the form and dimensions of the rough-split pipe staves (so called) is the best adapted to the preservation of the life of the timber in seasoning and from injurious effects from the action of the elements, and from injuries in transportation; that the rough-split pipe and hogshead stave is used in the manufacture of almost every article made wholly or in part of wood, and is not confined wholly or mainly to the manufacture of hogsheads, pipes, and other casks, and that the same is true of all large split staves in the rough state as they are brought from the forests or woods; that to make hogshead, pipe, or other staves from the timber in the forest is no part of the cooper's trade, and does not require more skill than
5 that possessed by every common laborer, and said staves are known and called by coopers and in commerce, "coopers' timber;" that to prepare, dress, and fit the rough stave for the cask requires the greater skill of the cooper, and in his trade the rough-seasoned stave is furnished him, and is known to him, as the rough or raw material, out of which, in part, he manufactures the cask or other commodity in his trade as a mechanic; that the scarcity of timber suitable to split into staves on this continent accessible from our lakes and rivers for the last fifteen years has compelled or occasioned the invention of a greater variety of machinery for the cutting, planing, and sawing of staves out of timber and wood not susceptible of being split, most of which said machinery fits and completes the stave for the particular cask for which it was designed, and patent rights are obtained for this machinery by the inventors; that rough-split pipe, hogshead, and other heavy staves are exclusively used as dunnage in the stowing of cargoes in ships and vessels navigating the oceans, seas, lakes, and rivers of the world, and for this purpose are obtained in the South and North American continents, in Norway, Sweden, and various other

European and Asiatic countries. It was also admitted by the said plaintiffs, on the hearing of the defence in said cause on said trial, that the said staves, imported by the said defendants, and for which duty is claimed in said declaration, were rough-split oak pipe and hogshead staves, and that they were wholly the growth and product of the province of Canada West.

Joseph Hubbard, a witness produced and sworn for and in behalf of
6 the defendants, on the trial of said cause, testified that he had resided in Macomb, Michigan, for the last twenty-five years, and most of said time had been engaged in the purchase and sale of pipe and hogshead staves; that he is a cooper by trade, and knows the process of making rough-split pipe, hogshead, and other staves in the Canadas and the United States; that to make such staves only requires the most common labor, and does not require the skill of a mechanic, and to split and make such staves is no part of the cooper's or any other trade; that a rough-split hogshead or pipe stave is not wholly or in part a manufactured article; that the rough-split stave is furnished the cooper as the raw material, out of which he in part manufactures the commodities or articles in his trade, and such staves are known in the coopers' trade, and among coopers, as coopers' timber, when furnished him for the manufacture of casks; that a rough-split pipe stave is a piece of timber usually fifty-five inches in length, six inches wide, and from one to one inch and a half thick; that a split hogshead stave is a piece of timber usually forty-four inches long, five inches wide, and from one inch to one inch and a half thick; that the straight-grained trees of the forest of proper diameter are most conveniently worked into the pipe or hogshead stave, and in those forms are best preserved and rendered most suitable for use and an article of commerce; that the rough-split stave is dressed and fitted by the cooper for the cask by sawing the same to a proper length, by hewing, shaving, planing, and jointing, and to fit said stave for the cask properly requires as much skill in the trade as is required to do any
7 other part of the work necessary in the manufacture of the casks made in the trade.

Thereupon the following questions arose, to wit:

1st. Whether, under the reciprocity treaty concluded the fifth day of June, and ratified on the ninth (9th) day of September, in the year one thousand eight hundred and fifty-four, between the United States of America and the Queen of Great Britain, and the acts of Congress relating to the matters involved in said suit, said timber, staves, and property described in the proofs and admissions in said cause were liable to duty, as alleged in said declaration.

2d. Whether, in case the said jury should find the facts to be that said staves and property were unmanufactured articles in whole and in part, the said timber and property were liable to duty at the time of its importation.

3d. Whether, under said reciprocity treaty, any timber other than such as is either round, hewed, or sawed, is made free of duty.

On which said questions the opinions of the said judges were opposed.

Whereupon, on motion of the plaintiffs by their counsel, that the points in which the disagreement hath happened may, during the term, be stated under the direction of the judges and certified under the seal of this court to be finally decided, it is ordered that the foregoing statement of the pleadings and facts, which is made under the direction of the judges, be certified according to the request of the plaintiffs by their counsel, and the law
8 in that case made and provided.

UNITED STATES OF AMERICA,
Eastern District of Michigan:

I, William D. Wilkins, clerk of the circuit court for the eastern district of Michigan, do hereby certify the foregoing to be a copy from the minutes.

Given under my hand and the seal of office, at Detroit, on the fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty-four.

WM. D. WILKINS, *Clerk.*

Filed October 27, 1864.